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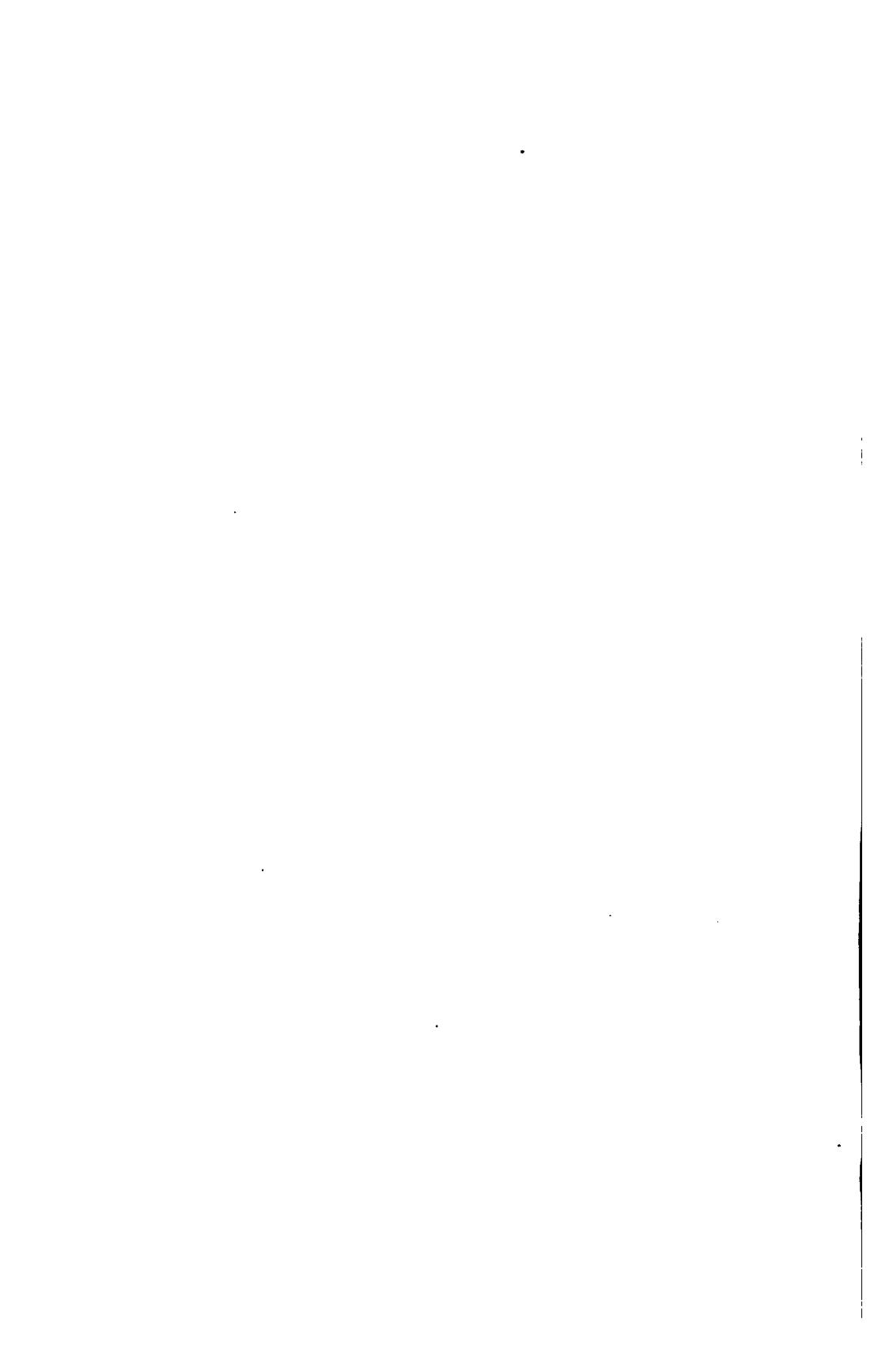
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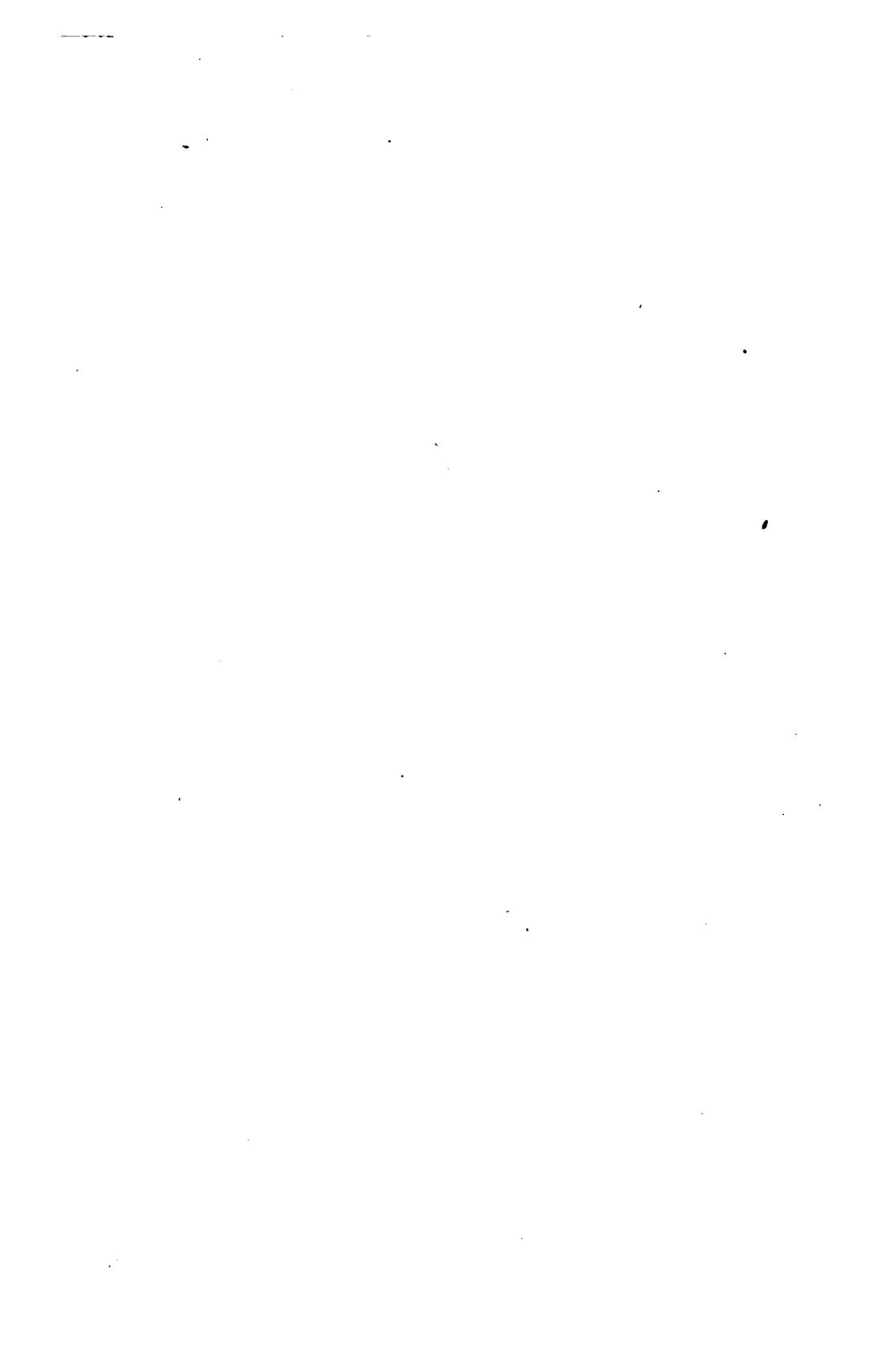


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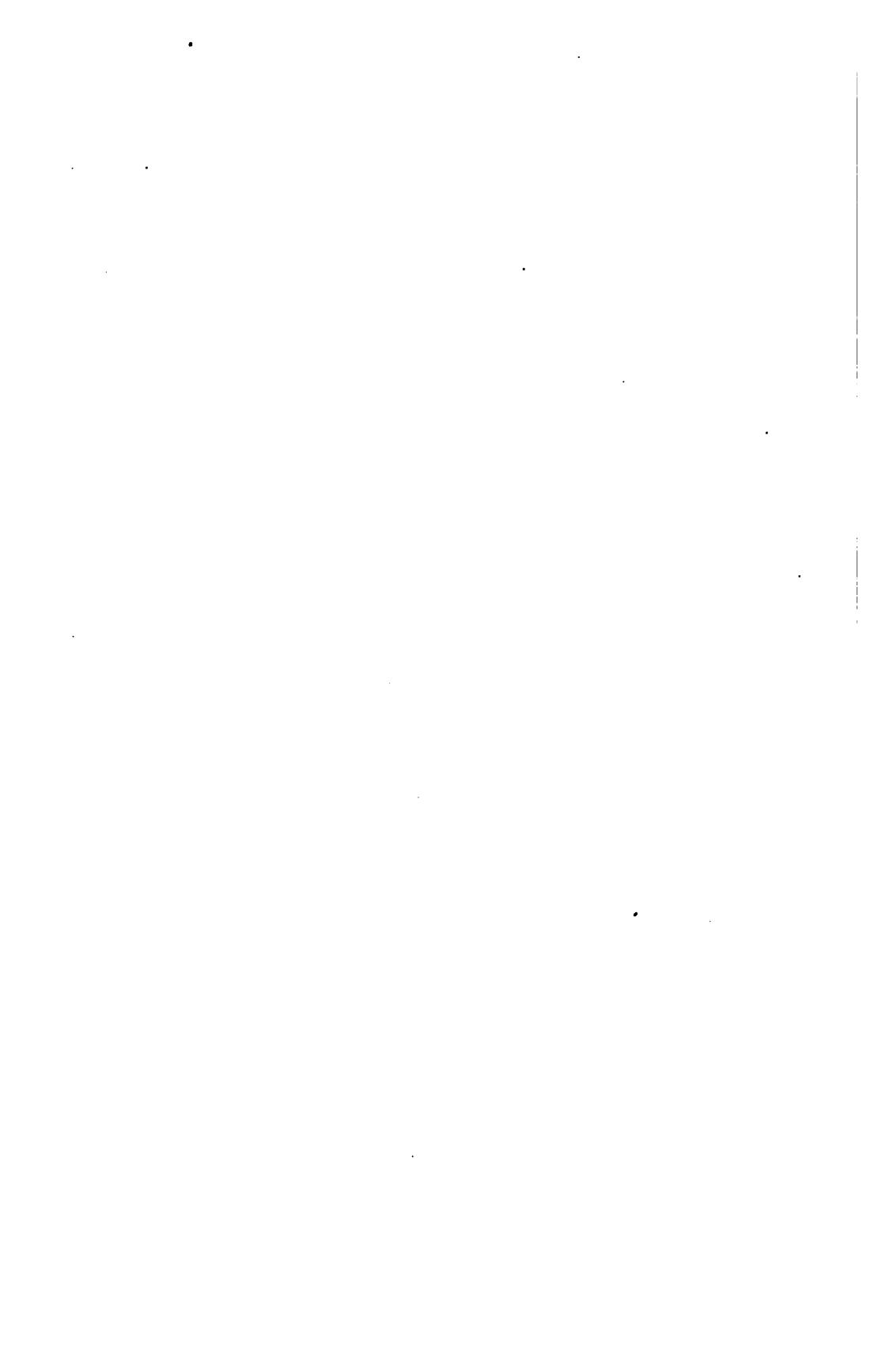












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REPORTS

OF

CASES ARGUED AND DETERMINED

IN THE

SUPREME COURT OF JUDICATURE

OF THE

STATE OF INDIANA,

WITH TABLES OF THE CASES REPORTED AND CASES
CITED AND AN INDEX.

BY JOHN L. GRIFFITHS,
OFFICIAL REPORTER.

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JUDGES
OF THE
SUPREME COURT
OF THE
STATE OF INDIANA,
DURING THE TIME OF THESE REPORTS.

HON. WALTER OLDS.* †
HON. SILAS D. COFFEY. †
HON. BYRON K. ELLIOTT. ‡
HON. ROBERT W. McBRIDE. §
HON. JOHN D. MILLER. ||
HON. JOHN G. BERKSHIRE. ** †

* Chief Justice at the November Term, 1890.

† Term of office commenced January 7th, 1889.

‡ Term of office commenced January 3d, 1887.

§ Appointed December 17th, 1890, to succeed Hon. Joseph A. S. Mitchell.

|| Appointed February 25th, 1891, to succeed Hon. John G. Berkshire.

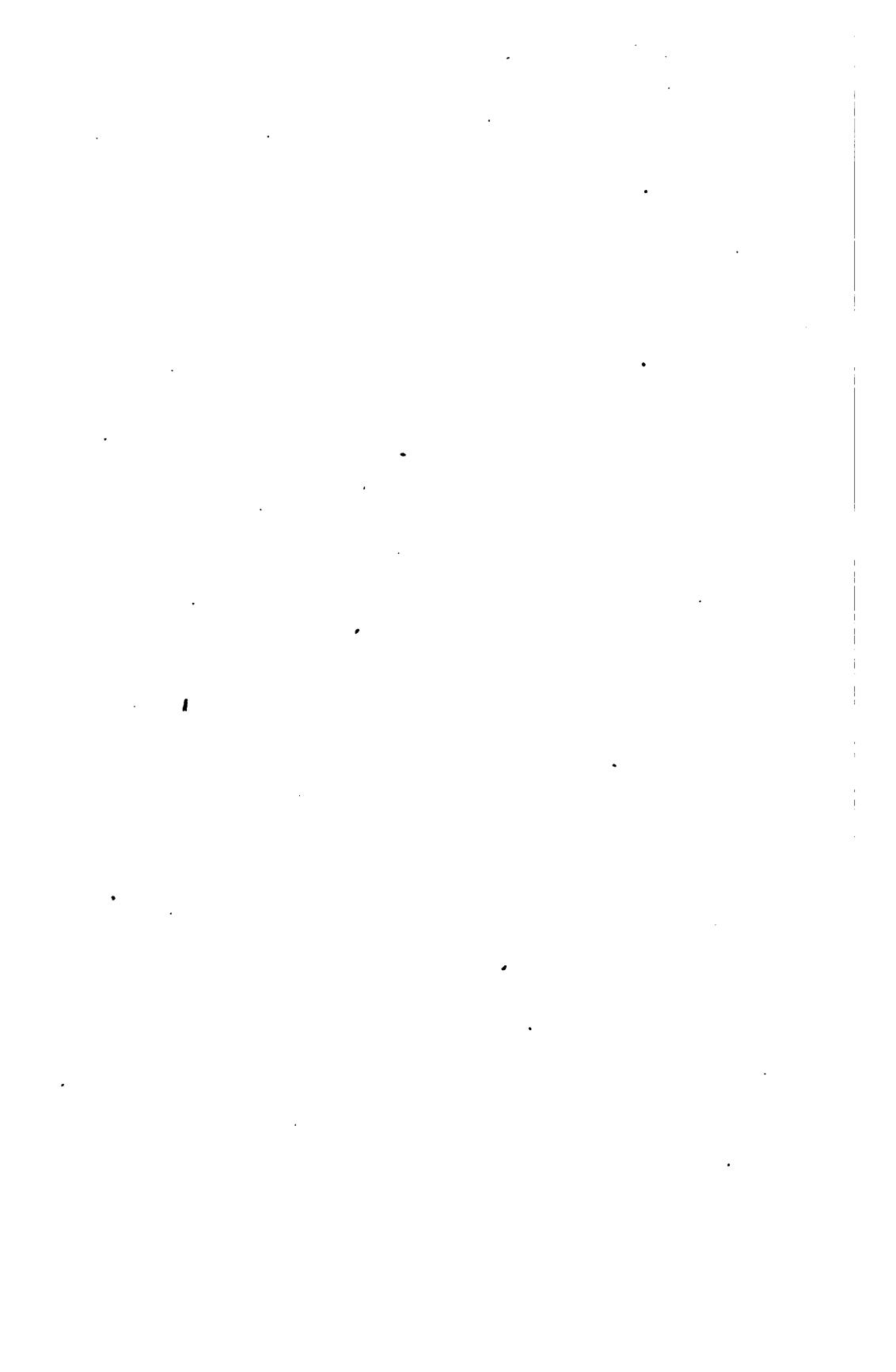
** Died February 19th, 1891.

OFFICERS
OF THE
SUPREME COURT.

CLERK,
ANDREW M. SWEENEY.

SHERIFF,
JAMES L. YATER.

LIBRARIAN,
WILLIAM W. THORNTON.



CASES
ARGUED AND DETERMINED
IN THE
SUPREME COURT OF JUDICATURE
OF THE
STATE OF INDIANA,
AT INDIANAPOLIS, NOVEMBER TERM, 1890, IN THE SEVENTY-
FIFTH YEAR OF THE STATE.

No. 14,685.

BROSnan ET AL. v. SWEETSER.

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128 43

NEGLIGENCE.—Personal Injury.—Fall Through Trap-Door in Store-Room.—In an action by the plaintiff against the defendants for damages resulting from injuries sustained by the plaintiff in falling through a trap-door in the store-room of the defendant, it appeared that on the occasion of the injury the plaintiff, a lady about fifty years old, and a stranger at the store, on her way to the rear of the store-room where the article she desired to purchase was kept, passed over a trap-door in front of the counter, used for entering the cellar, not noticing it; desiring a different grade of the article from that shown her she was directed toward the front; while she was looking at the first article the trap-door was opened for an employee to enter the cellar, and, as the custom was, the door was left open until he returned and another employee kept guard; the plaintiff started to go as directed, and not seeing the trap door or having any knowledge of its existence, fell through it and was injured. There was evidence that the plaintiff's eyesight was ordinarily good, and that her hearing was only slightly defective. As to the character of the warning given, whether sufficient or not, the evidence was conflicting.

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Held, that the questions whether the plaintiff was guilty of contributory negligence, or whether the warning was sufficient, are for the jury, and that a verdict for the plaintiff will not be disturbed.

SAME.—*Evidence.*—Where one of the defendants testified as to the necessity of maintaining the trap-door at the place where it was located and the impracticability of placing any railing around it or otherwise guarding customers against danger, except by having an employee to watch it when open, it was not error for the court to permit plaintiff's counsel, on cross-examination, to ask the defendant whether the trap-door could not have been placed back of the counter, and if it would not have been less dangerous at such point.

SAME.—*Damages.*—*Value of Nurse's Services.*—*Evidence.*—In an action for damages for personal injuries the reasonable value of properly nursing and caring for the injured person is an element of damages. The testimony of the physician of the plaintiff as to the value of the services of the nurse who treated her during her illness caused by the injury, is competent, although the services were rendered gratuitously.

From the Marion Superior Court.

H. N. Spaan, for appellants.

J. Coburn and R. Hill, for appellee.

OLDS, C. J.—This is an action by the appellee against the appellants for damages resulting from injuries sustained by the appellee in falling through a trap-door in the store-room of appellants.

The questions presented and discussed arise upon the motion for a new trial, which was overruled by the judge trying the cause, and exceptions reserved, and the judgment was affirmed at general term.

The appellants were engaged, at the time of the injury, in conducting a retail dry goods business, in a store-room on Illinois street, in the city of Indianapolis; in the store-room, in the passage-way in front of the counter, in that portion of the room used by customers, there was a trap-door, used for entering the cellar, in which appellants had goods stored. It was the custom upon a person entering the cellar through the door to leave the door open until the person came out, and during the time it remained open another employee stood guard at the door to warn persons of the danger. On

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the occasion of the injury the appellee, a maiden lady about fifty-two years old, a resident of the city, but a stranger at the store, desiring to purchase some calico, entered the store and was directed toward the rear of the store-room where the calico was kept ; she passed over the trap-door, not noticing it, and looked at the calico, and desiring a different grade from that exhibited to her, she was directed to some other calico at another point in the store toward the front, being in the direction from which she came on entering the store-room ; after she had passed over the trap-door, and while looking at the first calico exhibited to her, a lady clerk in the store directed a cash-boy to go into the cellar after some article, and he did so, opening the trap-door and leaving it open until he returned, and the young lady kept guard at the door ; while the trap-door was open the appellee started to go, as directed, to look at some other calico, and in doing so, not seeing the trap-door, or having any knowledge of its existence, she fell through it and received serious injuries.

It is contended by counsel for appellants that there is no dispute as to the material facts ; that the uncontroverted facts show that the young lady on guard at the trap-door was vigilant and did all she could to warn and prevent the appellee from falling into the trap ; that the lady on guard was of full age and a competent person to be intrusted with such a duty, and she called to appellee at a time and in sufficiently loud tones to have been heard by a person of ordinary hearing, and that she also motioned to the appellee in such a manner that her admonitions in that way might have been seen by a person of ordinary eyesight, and if heeded appellee would have avoided danger, and would not have been injured, and it is insisted that the injury occurred through no fault of the appellants or their employees, but by reason of the defective hearing and eyesight of the appellee, by reason of which she failed to hear or see the warnings given her, and of which defective hearing neither appellants nor

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their employee, who was on guard, had any knowledge ; and upon these grounds it is urged that the verdict is not supported by the evidence, and is contrary to law.

It is immaterial to consider at this point whether the conclusion of counsel for appellants is correct if the facts were as contended by him, for the reason that we can not agree with counsel that the facts contended for by him are undisputed. The store was a place where all were invited to come, whether old or young, whether possessed of full vigor and perfect faculties or aged and defective in some of their faculties, all alike were welcomed to the store, so that in caring for the safety of customers appellants were required to take into account the fact that some were young while others were old, some having good eyesight and others not, and it was their duty to guard against injury to those with failing faculties as well as those with ordinary faculties—indeed, if any difference, they were required to exercise a higher degree of caution to protect those who were not so well able to care for themselves.

There was evidence in this case tending to prove, and from which the jury may have found, that the appellee had at least average if not unusually good eyesight for a person of her age, then about fifty-two years ; that she did sewing, examined goods, could tell the figure ; that she did such things as persons generally do without the aid of spectacles ; that she was able to see everything about the store ; that she was a little near-sighted, but able to see persons and things across the street. The jury may well have come to the conclusion from the evidence that she had fairly good eyesight, and but little defect in her hearing. There was also evidence tending to prove that the young lady on guard was sitting on a stool some two or three feet on the opposite side of the trap-door, and gave no warning until too late for the appellee to avoid danger, just as she was falling. The appellee had just passed over the door in passing to the

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rear end of the store-room, had no knowledge of its existence and no reason to suspect danger.

The facts being controverted, it was for the jury to pass upon them, and having done so, and there being evidence to support their conclusion, this court will not disturb the verdict.

Counsel next contend that certain interrogatories are not properly answered, but no question is presented by the record as to the sufficiency of such answers.

It is contended by counsel for appellants that the court erred in refusing to give certain instructions requested on behalf of appellants.

We do not deem it necessary to set out the instructions given and refused. We have carefully examined all of them, and there is no error in the refusal of the court to give the instructions requested. The instructions given fully covered the case, and stated the law correctly, and, in so far as the instructions refused stated the law applicable to the case, they were fully covered by those given. The court gave to the jury instructions fully and fairly stating the law of the case.

The appellants were keeping a general store, known as a dry goods store, to which all of the public were alike invited. While they had the right to maintain a trap door into the cellar underneath, used for the storage of goods, if they did so in that portion of the room occupied and used by the public in passing into or in going to the rear of the store, or in purchasing goods, it was the duty of the appellants to use such caution in guarding it and preventing their customers from injuries, as the exigency of the occasion required, taking into consideration the location of the trap-door, and the fact that children and aged and infirm persons, and those of defective hearing and eyesight, as well as those of mature manhood and womanhood, in full possession of their faculties, would visit the store. And if such trap-door was not protected by a proper railing, and was in that portion constantly used by the public, and the manner of guarding

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it was by stationing a clerk or employee of the store to watch it when open, in such case it was the duty of such guard to vigilantly watch and give warning to persons approaching, and if apparent that such person, when spoken to or motioned to, did not hear or see the warning given, then it was the duty of the guard to give such other warning as could be reasonably given under the circumstances to prevent harm coming to the customer. The trap-door was in that portion of the floor constantly occupied by customers, and when open must, in the very nature of things, have been a dangerous pitfall, into which customers were constantly in danger of falling, and it imposed the duty upon the appellants to use vigilance in proportion to the danger in guarding their customers against injury.

It is a well settled rule that the reasonable care which persons are bound to take in order to avoid injury to others is proportionate to the probability of injury that may arise to others. And where a person does what is more than ordinarily dangerous, he is bound to use more than ordinary care. *Thompson Neg.*, p. 238; *Morgan v. Cox*, 22 Mo. 373; *Wharton Neg.* (2d ed.), sections 824 to 830; *Elliott v. Pray*, 10 Allen, 378.

In this case the appellee was a stranger in the store, and but a moment before passed over this trap-door in safety, and without any knowledge of its existence; she had a right to rely upon the floors being in good, safe condition; she had no reason to suspect danger; she was not called upon to be anticipating danger, and to be looking and listening for danger signals, though it was her duty to make proper use of her faculties to guard against and avoid danger. The warning should have been such as would, under such circumstances, be reasonably calculated to attract the person's attention and warn him of the danger. When a person puts a dangerous pitfall at a place where he invites people to come, he is under stronger obligations to guard it, and more vigilance is required in the guarding of it than if it was placed at some

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point where the public are not invited to come, and are less liable to visit; and the negligence of the employee on guard is the negligence of the master. The master is liable if injury results from the negligence of the servant placed on guard.

It is next urged that the court erred in permitting appellee's counsel to ask one of the appellants, when testifying as a witness on cross-examination, whether the trap-door could not have been placed somewhere else, and whether it could not have been placed back of the counter, and if it would not have been less dangerous at such point.

It was contended on the trial by appellants that there was a necessity for maintaining the trap-door at the place where it was located for the convenience of the business, and that they had the right to maintain it at such place, and counsel inquired of the witness, in the examination in chief, all about its location, the arrangement and use of the door, the necessity for it, and sought to show by the witness that it would be impracticable to place any railing around it, or otherwise guard customers against danger except as was their custom of having an employee watch it when open.

There was no available error in permitting the cross-examining questions to be asked and answered.

Lastly, it is contended that the court erred in permitting Drs. Garver and Hodges to testify as to the value of the services of the nurse who took care of the appellee while disabled by reason of the injury. They were regular practicing physicians and surgeons, with a number of years of experience, and both attended the appellee and treated her during her illness on account of the injuries received. As regards the testimony of Dr. Hodges there is no proper objection stated to the questions eliciting this testimony, and hence no question is presented.

In the brief of counsel no reference is made to either the page of the record or the question propounded to the witness and answered which it is contended elicited such im-

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proper testimony, and we are not called upon to search the whole record to see if we can find any evidence in the nature of that complained of in the brief of counsel. If counsel desire objections to particular evidence considered, it is their duty to refer in their brief to the particular part of the record where the question is presented, but we have examined the record, and we find that on Dr. Hodges being asked as to the value of the services of nurses, counsel for appellants said :

“ I object to this question for the same reasons I stated in my objection to this testimony before.”

This is the first question of the character propounded to the witness, Hodges ; as to where and when any objection was made to such testimony does not appear, and no question is presented by the objection interposed.

Dr. Garver was the regular attending physician and surgeon of the appellee, and treated her for the injuries, and had full knowledge of the nursing required and performed by the brother and sister of appellee during her affliction, and had knowledge of the value of such services. No objection is in fact made to the question asking this witness to state the value of such services. Upon the question being asked, counsel for appellee states what he understands to be the rule as to services rendered by one member of a family to another, and it is treated as an objection, overruled, and exceptions noted.

Our attention is not called to any evidence showing such a state of facts as would even preclude the nurses in this case from recovering the value of their services from the appellee ; but if such facts did exist, and the question was properly presented, the evidence was competent.

One element of damage is the reasonable value of properly nursing and caring for the injured person. If this be done by some good friend or member of the family, who donated his services, that is the good fortune of the appellee, and a matter with which the persons liable have no con-

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cern. If she had paid ten times the true value of such services she could only have recovered what such services were reasonably worth. Her contract or liability has nothing to do with the liability of the appellants. If they are liable for damages on account of the injuries, they are liable for the reasonable value of the necessary services of a nurse, the same as the services of a physician or surgeon. *Pennsylvania Co. v. Marion*, 104 Ind. 239; *Summers v. Tarney*, 123 Ind. 560.

There is no error in the record.

Judgment affirmed, with costs.

Filed Jan. 27, 1891.

No. 14,735.

BRADEN, ADMINISTRATOR, *v. LEMMON ET AL.*

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153	512
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127	9
153	684

PAYMENT.—*Plea of.*—*Proof.*—Proof that an attorney retained out of money collected on a judgment recovered for his client a sum sufficient to satisfy his lien for fees, will sustain a plea that the note given by the client to the attorney for such fees was paid.

SAME.—*Verdict.*—*Variance.*—A finding that other attorneys had an interest in the note in suit will not be disregarded as in conflict with the note, the court having found that it was agreed between the client and his attorneys that payment should be made to the payee of the note.

SAME.—*Question of Fact.*—Payment is a question of fact, and where the fact of payment of a note, the ultimate fact in issue between the parties to the suit, is stated as a conclusion of law and not as a statement of fact, the finding can not be aided by the conclusion of law, and a new trial should be granted.

From the Noble Circuit Court.

L. H. Wrigley, for appellant.

L. W. Welker, H. Corbin and J. D. McLaren, for appellees.

COFFEY, J.—This was an action, in the Noble Circui

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Court, instituted by the appellee Lemmon, to foreclose a mortgage on the land described in the complaint, executed to him in the year 1874, by one Moore. The appellant, as administrator of the estate of Fielding Prickett, deceased, filed a cross-complaint, in which he sought to foreclose a mortgage executed to Prickett in the year 1880; on the same land to secure a note for the sum of five hundred dollars. The appellees Corbin and McLaren who are now the owners of the real estate covered by these mortgages, answered, that the note executed by Moore to Prickett had been paid by Moore. The court, upon proper request, made a special finding of the facts proven on the trial, and stated its conclusions of law thereon. The facts found by the court, so far as they affect the controversy here are, substantially, as follows: That on the 11th day of March, 1880, Alexander Moore executed the mortgage set out in the appellant's cross-complaint, to secure a promissory note of that date for the sum of five hundred dollars, due six months after date, bearing eight per cent. interest from date, with attorney's fees; that said note, principal, interest, and attorney's fees, is due and unpaid, except as the facts hereinafter found show the same to be paid, and that said mortgage was the only mortgage ever executed by said Moore to said Prickett; that Samuel Braden, as administrator of the estate of Prickett, is entitled to recover, as attorney's fees, on said note, \$20; that Prickett departed this life, at Noble county, Indiana, where he resided, on the 28th day of May, 1886, the owner of the note and mortgage above described; that on October 3d, 1879, said Alexander Moore commenced a suit in the Noble Circuit Court against Stansberry W. Lemmon for the recovery of damages, and that said Prickett and H. G. Zimmerman, who were both practicing attorneys of said county, were employed as his attorneys at the commencement of the suit; that about the time the suit was commenced it was ascertained that some one would have to furnish Moore money to pay expenses of taking depositions in the State of

Braden, Administrator, v. Lemmon et al.

Ohio, and other expenses and outlays; that it was then agreed between Moore and his said attorneys that Moore should execute to Prickett a mortgage upon the real estate here involved to secure the fees of his attorneys, and to secure the repayment of the money advanced to him by Prickett to pay the expenses and outlays above named; that said note and mortgage were executed to Prickett in Van Wert county, in the State of Ohio, while there taking depositions in said cause, in the absence of Zimmerman, and there is no evidence to prove what was said or agreed between Prickett and Moore, at the time, as to the consideration. After the commencement of the suit by Moore against Lemmon, and before the execution of said note and mortgage, Isaac E. Knisely, an attorney of Noble county, was also employed by Moore as an attorney in said suit, and became associated with Prickett and Zimmerman in the prosecution of the same. Judgment was rendered in said cause in favor of Moore, on the 8th day of April, 1880, for the sum of \$1,300, which, on appeal to the Supreme Court, was affirmed.

At the time of the rendition of said judgment Prickett, Zimmerman, and Knisely, took a lien thereon for the sum of five hundred dollars, for their fees in the prosecution of the suit. On the 15th day of May, 1884, Lemmon paid to the clerk of the Noble Circuit Court the sum of seven hundred dollars on said judgment, six hundred and twenty-three dollars and eight cents of which was received for and drawn out by Prickett in satisfaction of the attorneys' lien, and the interest thereon. Of this sum he paid Zimmerman \$230, Knisely \$120, and retained \$273.08 for himself.

The court stated, as a conclusion of law, upon these facts, that the sum of \$623.08, shown by the findings to have been received by Prickett from the clerk of the Noble Circuit Court, on the 16th day of May, 1884, should be credited as of that date on the note for \$500, described and set out in the cross-complaint of Samuel Braden, as administrator of the estate of Prickett; that there is due to said administra-

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tor upon said note, after deducting said credit, the sum of \$60.42, principal and interest, and \$20 attorney's fees, making a total of \$84.42.

Thereupon the court entered a decree for the sale of the mortgaged premises, to pay the sum above found due.

The appellant, at the proper time, excepted to the court's conclusion of law upon the facts found. The appellees Corbin and McLaren also excepted to the conclusions of law. The questions involved in the case are properly presented here by assignment of error on behalf of the appellant, and by assignment of cross-errors on behalf of the appellees Corbin and McLaren.

It is contended by the appellant that the court should have stated, as a conclusion of law, from the facts found, that the note and mortgage executed by Moore to Prickett were wholly unpaid; while it is contended by the appellees, Corbin and McLaren, that the court should have stated, as a conclusion from the facts, that the mortgage was fully paid and satisfied.

It is first contended by the appellant that, conceding the six hundred and twenty-three dollars collected on the lien for attorney's fee to be a proper credit on the mortgage, under a proper pleading the facts as found by the court do not sustain the plea that it was paid by Moore to Prickett.

We are not inclined to give our assent to this contention. The judgment recovered by Moore against Lemmon was the property of Moore. True, his attorneys had a lien upon it for their fees in obtaining it, but his title was not divested. If his attorneys collected the money on the judgment, and applied it to the satisfaction of their fees, it may well be said that Moore paid them, as they were paid out of his money. Assuming that there was a variance between the plea of payment filed by Corbin and McLaren, we think the variance an immaterial one. Section 391, R. S. 1881; *Farley v. Eller*, 29 Ind. 322; *Krewson v. Cloud*, 45 Ind. 273.

It is also contended by the appellant that the facts stated in the special finding tending to show that Zimmerman and

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Knisely had an interest in the debt evidenced by the five hundred dollar note in suit, are in conflict with the note, because the note is payable to Prickett alone, and should not be considered.

It is true that, ordinarily, a party who executes a note to another will be estopped from saying that the party to whom the note is made payable is not the real party in interest. *Johnson v. Conklin*, 119 Ind. 109.

The principle here contended for is of little importance, however, in this case, as the money about which this contention is waged was all received by Prickett. The relation existing between him and his associates was a matter to be settled between themselves. No reason is suggested, and we know of none, why Moore and his attorneys might not make a valid agreement to the effect that all their fees in the case of Moore against Lemmon should be paid Prickett.

The court finds that such an agreement was made. Proof of such an agreement would not contradict the note, but would prove the consideration upon which it is based.

The real controversy between the parties relates to the effect of the special finding above referred to, the appellant contending that payment is an ultimate fact to be found by the court, while it is contended by the appellees that payment is a conclusion of law to be deduced from a given state of facts.

Mr. Thompson, in his work on Trials, vol. 1, section 1253, says: "There is no rule of law as to what is or as to what is not payment. Payment is simply the doing of what a man has agreed to do. It is, therefore, a pure question of fact; and where a man has agreed to pay, and tenders what he understands to be a performance of his agreement, and the other party accepts, it is a naked question of fact and intent whether it was accepted as performance. In every such case the ultimate point of inquiry does not touch a rule of law, but stops at a conclusion of fact." As applied to this

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case we fully concur in what Mr. Thompson says upon this subject. . Payment is a question of fact, and not one of law.

It will be observed that in what purports to be the special finding of facts, there is no direct finding that any portion of the note set up in the cross-complaint has been paid.

The facts found by the court are evidential facts tending strongly, no doubt, to prove that the money collected by Prickett on the Lemmon judgment was intended by the parties as a payment on the note in suit ; but the ultimate fact of payment is not stated in the special finding of facts. It is stated, however, as a conclusion of law.

If what purports to be the finding of facts is to be considered separate and apart from that which purports to be the conclusions of law, then the special finding is defective ; but if they are to be considered as a whole, the ultimate fact of payment appears. The question, therefore, is, shall we reject the finding of the ultimate fact of payment because it is stated as a conclusion of law, and not as a statement of fact.

The question here presented does not seem to be open to argument.

In the case of *Kealing v. Vansickle*, 74 Ind. 529, it was held that if, in the special finding, items of evidence only are stated, instead of the facts which ought to be found, and if the statement of the legal conclusions embraces matters of law, and also matters of fact which ought to have been found as such, a *venire de novo* should be granted.

In the case of *Jarvis v. Banta*, 83 Ind. 528, it was held that the special finding of facts could not be aided or enlarged by the conclusions of law stated by the court.

Following these cases we are constrained to hold that we can not look to what purports to be the conclusion of law in this case to aid the finding of facts ; and that, for this reason, the special finding is defective in failing to find the fact of payment, the ultimate fact in issue between the parties.

This conclusion renders it unnecessary to consider the cross-errors assigned by the appellees.

Sage v. The State.

Judgment reversed, with directions to the circuit court to set aside the finding and grant a new trial.

Filed Jan. 28, 1891.

No. 15,774.

SAGE v. THE STATE.

CRIMINAL LAW.—*Grand Jury.*—*Irregularities.*—*Abatement.*—The failure of the court to interrogate a by-stander, called as a grand juror, before permitting him to become one of the panel, as required by statute (section 1651, R. S. 1881), is not sufficient cause for abatement of the prosecution, if such person is in fact a qualified juror.

SAME.—*Murder.*—*Accessory before the Fact.*—*Amendatory Act.*—*Ex Post Facto Law.*—The act of March 9th, 1889 (Elliott's Supp., section 302), amending section 1788, R. S. 1881, which declares who shall be deemed an accessory before the fact to the crime of murder and prescribes the punishment, makes no change in the former law except as to the remedy. The change made does not take away the right of the State to prosecute for a felony committed prior to its enactment, as a change in the remedy is not within the constitutional inhibition in respect to *ex post facto* legislation.

SAME.—*Re-Enactment of Statute.*—*Statute not Repealed.*—An amendatory statute, defining an offence in substantially the same language as that employed in the statute it amends, and simply re-enacting it, does not deprive the State of the right to prosecute for an offence committed before the act became effective.

SAME.—*Evidence.*—On the trial of a man as accessory before the fact to the murder of an illegitimate child by its mother, which he had made the condition of his marrying the mother, it was competent for the State to prove by her that she was pregnant as the result of an illicit intercourse with the accused, such fact tending to render probable her statement that he advised and encouraged her to murder the child; but it was not competent for the defence to prove specific acts of immorality with other men, as that she had previously given birth to an illegitimate child.

SAME.—*Confidential Communications.*—The admission of evidence that the accused and his wife were in a room by themselves after the arrest does not violate the rule protecting communications between husband and wife.

SAME.—*Testimony of Deceased Witness.*—*Stenographer's Report.*—The official

127	15
128	340
127	15
135	200
136	109
127	15
138	450
127	15
142	634
127	15
147	449
127	15
148	92
149	48
127	15
157	63
127	15
166	625

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stenographer may properly be permitted to read from his report of the testimony of a witness given on a former trial, who had since died.

SAME.—*Defendant's Statement before Coroner.*—The statement of the defendant, accused as an accessory before the fact, made before the coroner, authenticated by the coroner's certificate and identified by him as the statement made by the defendant, was properly admitted in evidence, and the accused had no right, on cross-examination of the coroner, to inquire whether the statement was all reduced to writing.

SAME.—*Witness.*—*Impeachment of Character.*—Where a witness, whose character was sought to be impeached, had been imprisoned in one of the prisons of the State, remote from her place of residence, and was, during the seven years intervening between the time of the trial and the time she last resided at her former home so confined in prison, it was not error to refuse to permit a witness who had testified as to the character of such witness at the time she resided at her former home, to testify as to the general character of the witness at such former residence at the time of the trial.

SAME.—*Witness's Interest in Defendant's Cause.*—Defendant's witness may properly be asked on cross-examination if he did not leave home in order to enable the defendant to obtain a continuance, as the question tends to show the interest of the witness in the defendant's cause.

SAME.—*Complicity of Accused.*—*Evidence.*—The defendant made the murder of an illegitimate child a condition of his marrying the mother, and to influence him to take her as his wife she murdered the child. For a number of years she declined to implicate her husband, and continued to do so until the defendant, after she had been in prison for some years, applied for a divorce.

Held, that it was competent for the State to prove when the wife made known her husband's complicity in the crime.

SAME.—*Words and Acts of Accessory.*—Where death results from a felonious act of the principal, brought about by the counsels or commands of the accessory, the latter is guilty, although death may not have resulted immediately or directly from the act of either of the wrong-doers. Nor is it necessary that the acts or words of the accessory should directly incite or expressly command the principal to commit the homicide; it is enough if it appears that the acts or words of the accessory were intended to secure the unlawful killing of the deceased, and that they effected that result.

ARGUMENT OF COUNSEL.—*What Does not Constitute Misconduct.*—Erroneous inferences from the evidence drawn by counsel and stated in their addresses to the jury, or mistaken opinions of the law expressed by them in such addresses, do not, as a general rule, entitle the complaining party to a new trial.

From the Grant Circuit Court.

Sage v. The State.

W. H. Carroll, A. E. Steele and J. A. Kersey, for appellant.

A. G. Smith, Attorney General, *C. M. Ratliff*, Prosecuting Attorney, *S. W. Cantwell*, *H. Brownlee*, *H. J. Paulus* and *O. A. Baker*, for the State.

ELLIOTT, J.—The appellant was indicted as an accessory before the fact to the crime of murder in the first degree. The indictment first returned against him was held bad on a former appeal. *Sage v. State*, 120 Ind. 201. He was again indicted, tried, and convicted.

A plea in abatement, filed by the accused, presents the question as to the effect of the failure of the court to interrogate a bystander, called as a grand juror, before permitting him to become one of the panel. The statute requires that "before any talesman is accepted and sworn, the court must inquire of him, under oath, as to his qualifications." Section 1651, R. S. 1881. This provision does, unquestionably, impose a duty upon the trial court, and if it could be assumed, as a matter of course, that every error, or every departure from duty, which occurs in selecting grand jurors, entitles an accused to a judgment abating the prosecution, then we should have no difficulty in reaching the conclusion that the trial court did wrong in sustaining the demurrer to the plea; but it is, by no means, every breach of duty regarding the selection of grand jurors that is cause for abatement; on the contrary, a breach of duty, or an error, which does not prejudice the accused, is not sufficient cause for abating the prosecution against him. If, in fact, duly qualified grand jurors are selected, the prosecution will not abate, although there may be some errors, or irregularities, in the mode of their selection. Our conclusion that where qualified jurors are secured, an error, or irregularity, in calling, or empanelling them, does not supply ground for a judgment of abatement, is well fortified by authority. *Har-*

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din v. State, 22 Ind. 347; *Cooper v. State*, 120 Ind. 377; *State v. Mellor*, 13 R. I. 666; *Commonwealth v. Brown*, 147 Mass. 585.

As there is no pretence that the bystander called into the box was not fully qualified to serve as a grand juror, the question presented by the plea in abatement is fully disposed of by the application of the doctrine we have stated.

The statute defining the offence of which the appellant was convicted, in force at the time the acts which constitute the crime were done, reads thus: "Every person who shall aid or abet in the commission of any felony; or who shall counsel, encourage, hire, command, or otherwise procure such felony to be committed—shall be deemed an accessory before the fact, and may be tried and convicted in the same manner as if he were a principal, and either before or after the principal offender is convicted, and charged or indicted; and upon such conviction he shall suffer the same punishment and penalties as are prescribed by law for the punishment of the principal." In 1889, an act was passed which reads as follows: "Be it enacted that section 1788, R. S. 1881, be amended to read as follows: Every person who shall aid or abet in the commission of a felony, or who shall counsel, encourage, hire or command, or otherwise procure a felony to be committed, may be charged by indictment, or affidavit and information, tried and convicted in the same manner as if he were a principal, either before or after the principal offender is charged, indicted or convicted, and upon such conviction he shall suffer the same punishment and penalties as are prescribed by law for the punishment of the principal." Elliott's Supp., section 302. There is, in our judgment, no substantial difference between the two acts, except as to the matter of the remedy, for the elements of the crime are the same under the one statute as under the other. It is true that the later act omits the words "shall be deemed an accessory before the fact," but this omission effects no substantial change in the nature of the offence. It is of little im-

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portance that a name or title is altered or omitted where the body of the offence remains the same, and it does in this instance so remain. The omission to give the offence defined a formal name neither adds to the burden of the accused nor diminishes that of the State. No less evidence would be required on the part of the State to warrant a conviction, nor more required on the part of the accused to secure an acquittal under the later statute than was required under the earlier. In no particular whatever, save as to the remedy, does the amendatory statute work any change.

Having ascertained and stated the difference between the two statutes, we are next to inquire and decide whether such a change as that wrought by the amendatory act of 1889 takes away the right of the State to prosecute for a felony committed prior to its enactment. As we have seen, the two statutes are, as regards the offence itself, substantially the same, for precisely the same acts are essential to constitute the crime under both the earlier and the later statutes, so that the situation of the accused is not altered in this respect to his disadvantage, nor is it altered in respect to the punishment, hence it can not be justly asserted that there has been any *ex post facto* legislation. *Holden v. Minnesota*, 137 U. S. 483; *Medley, Pet.*, 134 U. S. 160; *Calder v. Bull*, 3 Dall. 386; *United States v. Hall*, 2 Wash. C. C. 366. The general rule is that a change in the remedy is not within the inhibition of the Constitution. *Robinson v. State*, 84 Ind. 452; *State v. Manning*, 14 Tex. 402; *Lazure v. State*, 19 Ohio St. 43; *Sullivan v. City of Oneida*, 61 Ill. 242; *Rand v. Commonwealth*, 9 Gratt. 738; *South v. State*, 86 Ala. 617; *Perry v. State*, 87 Ala. 30; *State v. Cooler*, 30 S. C. 105; *State v. Ah Jim*, 9 Mont. 167.

It is possible that the doctrine asserted by the majority of the court in *Kring v. Missouri*, 107 U. S. 221, does in some degree impinge upon the general rule asserted by the decided weight of authority, but that decision does not go to the extent of breaking down the general rule so long approved by

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the courts and the text-writers, for the utmost that can be said of that decision is that it declares that the mode of procedure may sometimes so far and materially affect the rights of an accused as to fall within the sweep of the constitutional provision prohibiting the enactment of *ex post facto* laws; but giving to that decision the comprehensive effect just ascribed to it, still the act of 1889 is not within its scope, for the reason that the provisions of the act affect the remedy purely, and they neither make it easier for the State to convict nor harder for the accused to secure an acquittal. In short, that act, justly interpreted, simply affects the mode of pleading, and that only to the extent of providing an additional mode of presenting the charge.

A more difficult question is presented by the contention of appellant's counsel that the amendatory act obliterated the act of 1881, and left no law in force defining the crime of which their client was convicted. It is true that in a certain sense and for certain purposes an amendatory act does strike down the act which it amends, for it has often been held that an act which has once been amended can not be again amended, since it is superseded by the amendatory act. *Draper v. Falley*, 33 Ind. 465; *Board, etc., v. Markle*, 46 Ind. 96; *Longlois v. Longlois*, 48 Ind. 60; *Blakemore v. Dolan*, 50 Ind. 194; *Feibleman v. State*, 98 Ind. 516; *Hall v. Craig*, 125 Ind. 523. These decisions undoubtedly settle the law upon the question to which they are addressed, for they affirm that an attempt to amend a statute which has already been amended is fruitless, but that is not the question here, for the question here is, Does an amendatory statute which re-enacts a former statute so completely destroy it as to prevent a prosecution for an offence committed before the amendatory act became effective?

It is evident from our statement of the question that there is an essential difference between the class of cases represented by the present and the class represented by the decisions to which we have referred. It may well be true that an

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amended statute is so far superseded that it is incapable of further amendment, and yet not be true that the amendatory act so effectually sweeps away all vestiges of the earlier act that the offence ceased for a time to exist. The affirmation of the one proposition does not necessarily lead to the affirmation of the other, for the one may, with strict logical accuracy, be affirmed and the other denied. If this be true, then it must also be true that the decisions referred to do not require us to affirm that the re-enactment of a statute by an amendatory statute necessarily deprives the State of the right to prosecute one who committed a felony prior to the enactment of the amendatory statute. Giving to those decisions full sanction, and assigning to them due force and effect, we are, nevertheless, at liberty to adjudge that they do not settle the question here presented. That some of the expressions contained in the opinions do seem to sustain the position of appellant's counsel is true, but the authoritative declarations addressed to the questions before the court, and relevant to the point in judgment, have no such effect, hence they can not be regarded as of binding force. As arguments they are entitled to consideration, but only to consideration as arguments, upon the question in the mind of the court ; so far, however, as regards questions arising upon a radically different state of facts, they are of comparatively little weight even as arguments.

Assuming, upon the strength of what we have said, that the question here involved is not conclusively settled by the cases to which we have referred we shall treat it as one open to discussion, and shall first consider it upon principle.

Principle forbids the conclusion that an amendatory statute defining an offence in substantially the same language as that employed in the statute it amends, takes away the right of the State to prosecute the offender and requires his unconditional discharge. It can not be logically affirmed, where the same offence is defined in the same way by both the earlier and the later statute, that there is an interregnum

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in which there was no law defining the offence. The two acts interfuse and blend so fully and compactly that it is impossible that there can be an interval when there was no law. Between the two acts there is no period of intervening time in which no offence existed. The duration of the statute was unbroken and continuous, and the crime one and the same. The amendatory act creates no new offence, nor does it absolve an offender from one previously committed; it simply re-enacts the earlier statute, so that the offence is the same under the one act as under the other. If a new offence had been defined, or new elements added to the crime as defined in the first statute, there would be force in the position that the offence defined by the earlier act had ceased to exist, but where the offence remains unchanged from first to last there is no plausibility in the argument that when the amendatory statute took effect the crime ceased to exist. There can be no plausibility in such an argument for the plain reason that there was no interval when the crime was not punishable, inasmuch as there was not an instant of time when there was not a law defining and denouncing it. The succession of the statutes was unbroken, and the reign of law uninterrupted.

The conclusion to which the appellant's argument leads goes far to prove it unsound. If the argument is valid, then a man guilty of an offence, such as that of which the appellant was convicted, could not be punished if the crime was committed in 1881, although it had remained undiscovered until 1890. Again, if the crime was committed during the last hour before the act of 1889 went into effect, the offender could not, according to the appellant's theory of the law, be punished at all. A doctrine which leads to such results has nothing to commend it, and it would be a sacrifice of substance to a fancied demand of consistency to yield to it. To that demand we are not disposed to assent.

The authorities give the rule we have declared strong and full support. In the case of *State v. Wish*, 15 Neb. 448 (5

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Crim. Law Mag. 811), the question arose in precisely the same manner in which it arises in the case before us, and it was held that the amendatory act did not preclude a prosecution, although the acts constituting the crime were done before the enactment of the amendatory statute. In announcing its conclusion in that case the court said: "We hold, therefore, that when the re-enactment is in the words of the old statute and was evidently intended to continue in force the uninterrupted operation of such statute, the new act or amendment is a mere continuation of the former act, and is not in a proper sense a repeal." Other courts have declared a similar doctrine, asserting that the re-enactment of the old statute necessarily continues it in force, as there is no interval of time in which its operation was interrupted. *Commonwealth v. Sullivan*, 150 Mass. 315; *Fullerton v. Spring*, 3 Wis. 588; *Hurley v. Town of Texas*, 20 Wis. 665; *Randolph v. Larned*, 12 C. E. Green (N. J.), 557; *Dashiel v. Mayor*, 45 Md. 615; *Ballin v. Ferst*, 55 Ga. 546; *Willard v. Clarke*, 7 Metc. 435; *Kessler v. Smith*, 66 N. C. 154; *State v. Sutton*, 100 N. C. 474.

Some of the cases go further, for they declare that if the old statute is substantially re-enacted its operation is uninterrupted although the amendatory statute may contain an express repealing clause. *State v. Baldwin*, 45 Conn. 134; *Powers v. Shephard*, 48 N. Y. 540. Our own court has recognized and enforced the general doctrine that the statute amended is not repealed by an amendatory statute which substantially re-enacts it. In *Alexander v. State*, 9 Ind. 337, the question was presented, as it is here, upon an amendatory statute, and the court held that the old statute was not repealed in such a sense as to preclude the State from prosecuting for an offence committed before the amendatory statute was passed. The court there said: "It is clear that this was not a repeal. It was not so designed. It was simply an amendment. In *Cheezem v. State*, 2 Ind. 149, it was held that a re-enactment in substance of a section of former statute,

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was not a repeal of it." To the same effect is the decision in the case of *State v. Miller*, 58 Ind. 399. In that case the question was presented, as it is in this instance, and the court said: "The amendment of a statute is not a repeal of it by implication, further than it renders the amended statute inconsistent in letter or spirit, or both, with the unamended statute." The general question was before the court in *Cordell v. State*, 22 Ind. 1, and it was there said: "But the re-enactment of an existing provision of law, in a later statute, does not necessarily repeal such former provision." Other cases of our own assert the same general doctrine. *Gorley v. Sewall*, 77 Ind. 316; *Martindale v. Martindale*, 10 Ind. 566. The decision in the case of *Goodno v. City of Oshkosh*, 31 Wis. 127, is not opposed to the doctrine of our cases, although it is true that some expressions found in the opinion seem to warrant that inference. What is decided in that case is that a provision of the old statute not found in the new is repealed, so that it is quite clear that the decision is not relevant to the present controversy. It is evident from the earlier, as well as the later, decisions of the Supreme Court of Wisconsin, that it never intended to hold that an amendatory statute re-enacting the provisions of a former statute repealed entirely the old act, for no court has more clearly or strongly affirmed that the re-enactment of a former statute is not a repeal than that court has done. *State v. Ingersoll*, 17 Wis. 651; *State v. Gumber*, 37 Wis. 298; *Glentz v. State*, 38 Wis. 549; *Laude v. Chicago, etc., R. W. Co.*, 33 Wis. 640.

On the direct examination of Eliza Sage the fact that she was pregnant as the result of illicit intercourse with the appellant was elicited, and upon cross-examination it was sought to prove that she had previously given birth to an illegitimate child, but the court refused to permit her to be cross-examined upon that subject. In this there was no error. It was competent for the State to show the intimate relations between Eliza Sage, the principal, and the appellant, since that fact tended to render probable her statement

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that he advised and encouraged her to murder the child born to her as the fruit of a former carnal intercourse, but it was not competent for the defence to prove specific acts of immorality with other men.

There was no error in permitting the State to prove, as a fact, that the appellant and his wife, Eliza Sage, were in a room by themselves after the arrest. In admitting evidence of the fact the court did not violate the rule protecting communications between husband and wife.

No error was committed in permitting the official stenographer to read from his report of the testimony of a witness given on a former trial, who had since died. That the testimony of a deceased witness may be repeated at a subsequent trial is well settled. *Rooker v. Parsley*, 72 Ind. 497; *Indianapolis, etc., R. W. Co. v. Stout*, 53 Ind. 143; *Horne v. Williams*, 23 Ind. 37. It is also settled that the reproduction of the testimony of a witness, who was examined on a former trial, is not a violation of the fundamental rule that the accused has a right to be brought face to face with the witnesses against him. *Summons v. State*, 5 Ohio St. 325; 1 Bishop Crim. Pr. (3d ed.), sections 1195, 1196. A witness may, for the purpose of refreshing his recollection, refer to a memorandum made by him at the time. *Johnson v. Culver*, 116 Ind. 278; *Billingslea v. State*, 85 Ala. 323. He can not testify entirely from the memorandum, as a general rule, but he may use it for reference. *Maxwell v. Wilkinson*, 113 U. S. 656. As the question is here presented, and upon the specific objection made by appellant's counsel, the trial court went as far in its preliminary examination of the stenographer as it was required to do, and we are unable to say that any error was committed in allowing him to use his notes. It is proper to say that we deem it unnecessary to inquire whether an official reporter, sworn pursuant to law to make a true and correct report of the evidence, stands upon a different footing from ordinary witnesses or not; but we think it is also proper to say that there is much reason why a distinc-

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tion should be made in a case where a sworn official stenographer is called to testify as to the testimony of a deceased witness, and a case where an ordinary witness is called for that purpose.

The coroner who held the inquest over the body of the child murdered by Eliza Sage, and whose murder the appellant aided and advised, testified that a paper produced was the statement made by the appellant at the inquest; that officer further testified that the paper was read over to the appellant, that he signed it, and that he was sworn before his testimony was heard. The appellant's counsel proposed to cross-examine the coroner as to whether the paper signed by the appellant contained all the testimony given by him at the inquest, but the court refused to permit the counsel to examine the coroner upon that subject. The question as it comes to us does not require us to determine what the rule would be in a case where the accused offered, at the proper time, to show fraud or mistake in reducing his statements to writing, for here the question is whether the accused has a right, on cross-examination of the coroner, to inquire whether the statement was all reduced to writing. As the question is presented in this instance it must be held, upon the authority of *Woods v. State*, 63 Ind. 353, that it was rightly decided by the trial court that the appellant had no right to ask the questions he proposed.

The statement made by the appellant before the coroner came from the hands of the legal custodian and reads as a consecutive instrument, it is authenticated by the coroner's certificate and is identified by him as the statement made by the appellant. Under these circumstances the statement was properly admitted in evidence.

Eliza Sage, the principal, was a resident of Hartford City until May, 1883, when she was imprisoned in one of the prisons of the State, at Indianapolis. This trial was begun on the 6th day of May, 1890, and, in the course of the trial, a witness called by the appellant was asked to "state to the

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jury whether you are acquainted with her general moral character at the present time in that neighborhood." The court had permitted the appellant's witness to testify as to the character of Eliza Sage at the time she resided in Hartford City, and by the term "that neighborhood," was meant Hartford City. The question for our decision is whether the trial court erred in refusing to permit the State to prove the character of the witness at a place where she had not been for about seven years. But for the fact that the witness whose character was assailed was during the seven years intervening between the time of the trial and the time she last resided at Hartford City, confined in prison at Indianapolis, there would be much less difficulty in solving the question.

We agree with appellant's counsel, that the decisions in such cases as *Rucker v. Beatty*, 3 Ind. 70; *City of Aurora v. Cobb*, 21 Ind. 492; *Abshire v. Mather*, 27 Ind. 381; *Chance v. Indianapolis, etc., Co.*, 32 Ind. 472; and *Rawles v. State*, 56 Ind. 433, do not determine the question here presented; but we do not agree that the decisions in *Memphis, etc., Co. v. McCool*, 83 Ind. 392, and *Pape v. Wright*, 116 Ind. 502, decide the question in their favor. The truth is that in none of those cases is the question presented as it is here, although the cases first named bear upon the general question, inasmuch as they declare that where the time is too remote the impeaching evidence is not competent.

It is evident that a general character may change in seven years; but it is, we suppose, also evident that a general character can not be created within the walls of a prison so as to be known at the former home of the witness, many miles distant from the prison. If this be true, then witnesses who knew nothing of the witness sought to be impeached in this instance, during the seven years of imprisonment, can not know her general character at her former home at the time of the trial. The utmost that such impeaching witnesses can know is that the character of the witness assailed was bad at the

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time she left her home to become a prisoner. The trial court, it is to be kept in mind, permitted evidence of the character of Eliza Sage, at the time she resided in Hartford City, to be given, and this ruling certainly gave the appellant the benefit of all the knowledge his impeaching witnesses could possess. Counsel quote from a text-book as sustaining their position, the following statement of the law: "It is attempted to impeach the character of P., a witness at a trial. A. and B. knew P. four years before, when he resided at another place. They testify that P.'s character was then bad. The presumption is that P.'s character remains the same." Lawson Presumptive Ev., 180. Granting that this is a correct statement of the law, it proves that the ruling of the trial court was right, not wrong, as counsel assume, since it gives their client the benefit of the testimony of the character of Eliza Sage at the time she left Hartford City, and authorizes the presumption that her character continued bad until the time of the trial. Our conclusion is, that whatever may be the true rule upon the general question, the trial court did not, in this instance, err to the prejudice of the appellant.

One of the witnesses called by the appellant was asked, on cross-examination, if he did not leave home in order to enable the defendant to obtain a continuance, and to this question counsel interposed a general objection. Under the general objection no question is properly presented, but waiving the infirmity in the objection, and deciding the question as if it were properly presented, we adjudge that no error was committed. This we do for the reason that the question asked, on cross-examination, was competent as tending to show the interest of the witness in the appellant's cause.

The witness Eliza Sage was recalled for cross-examination after the defendant had introduced part of his evidence, and the cross-examining counsel proposed to ask her several

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questions respecting her treatment of the child she subsequently murdered, but the court refused to permit the questions to be answered. We can not hold that there was any abuse of discretion by the trial court, for the questions referred to specific collateral acts, and did not bear upon the subject of the direct examination.

It appears from the evidence that for years the witness, Eliza Sage, had declined to implicate her husband in the murder of her child, and that she had sheltered him from prosecution. It appears further that he made the murder of the child a condition of his marrying her, and that it was to influence him to take her as his wife that she murdered her child. After she had been for some years in prison the appellant applied for a divorce. In view of this evidence it was clearly competent for the State to prove when it was that the wife made known her husband's complicity in the crime, although she had previously shielded him.

We do not deem it necessary to prolong this opinion by quoting from the argument to the jury the statements of the counsel for the State to which the appellant's counsel objected ; it is enough to say that the court promptly checked the State's attorney, and that his misconduct, if it was misconduct at all, was not of such a nature as to authorize a reversal. Erroneous inferences from the evidence drawn by counsel and stated in their addresses to the jury, or mistaken opinions of the law expressed by them in such addresses, do not, as a general rule, entitle the complaining party to a new trial. *Combs v. State*, 75 Ind. 215 ; *Proctor v. De Camp*, 83 Ind. 559 ; *Warner v. State*, 114 Ind. 137.

The court refused to give an instruction asked by the appellant, which reads thus : " It will be necessary for the State to prove, beyond a reasonable doubt, that the killing of Harry Albert Cunningham by Eliza Sage was a direct and immediate effect of some act done by her in pursuance of the counsel, command or procurement of the defend-

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ant. The concealment of the knowledge that a felony is to be committed, or tacit acquiescence in its commission, or words that amount to a bare permission to commit a felony, would neither make the defendant an accessory before the fact, nor a principal in the alleged crime." This instruction was properly refused. It was not necessary, as the instruction erroneously asserts, that the "killing of Harry Albert Cunningham" should have been the "direct and immediate effect of some act" done by Eliza Sage. If the death resulted from a felonious act of the principal, brought about by the counsels or commands of the accessory, the latter is guilty, although death may not have resulted immediately or directly from the act of either of the wrong-doers. It is a familiar principle of criminal law that it is not necessary that death should be the proximate result of the felonious act. *Harvey v. State*, 40 Ind. 516; *Kelley v. State*, 53 Ind. 311; *Bloom v. Franklin Life Ins. Co.*, 97 Ind. 478, and authorities cited p. 486. Nor is it necessary that the acts or words of the accessory should directly incite or expressly command the principal to commit the homicide; it is enough if it appears that the acts or words of the accessory were intended to secure the unlawful killing of the deceased, and that they effected that result.

Where the court in one instruction fairly and accurately states the law upon the subject of what constitutes a reasonable doubt, it is not necessary to repeat it in other instructions, nor is the court bound to set before the jury the various definitions that courts or writers have attempted to give to the term "reasonable doubt." If a fair and sufficiently adequate definition of that term is once given, all is done that the law requires.

The tenth instruction asked by the appellant was properly refused. It is not the duty of the court to state to the jury the probative effect of facts where different inferences may be drawn from them.

We have given to the questions discussed by counsel full

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and careful consideration, but we can find no error in the record which will authorize a reversal; on the contrary, the record shows that the case was well and fairly tried.

Judgment affirmed.

Filed Jan. 28, 1891.

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No. 14,400.

HABIG ET AL. v. DODGE ET AL.

DESCENT.—Childless Second Wife.—Interest of as Widow.—Forced Heirs.—Prior to the act of March 11, 1889, a childless second wife took an interest equal to the undivided one-third in fee simple in her deceased husband's real estate. During her lifetime the children of her husband had no vested estate in the property which descended to her, but at her death they became her heirs by compulsion of law.

SAME.—Partition.—Title not in Issue.—In a suit for partition by one of the children of the deceased husband against the widow and the other children, if the title is not directly put in issue by the pleading, a decree adjudging the widow was entitled to an estate for life is not conclusive as to her interest.

SAME.—Warranty by Heirs Apparent.—Where one of the children of the deceased husband executes a warranty deed to her expected interest in the widow's one-third and dies before the widow, such warranty deed does not bind her children, and they are not estopped to set up their title as the heirs of the widow, at the widow's death.

SAME.—Warranty Deed.—EstoppeL.—Where one of the children assumes to convey and warrant the title to a reversionary interest equal to the undivided one-third of the real estate previously set off to the widow, the grantee acquires by the deed a one-third interest in the land, subject to the estate of the widow and the grantor, and all those claiming through him are estopped to assert the contrary.

From the Gibson Circuit Court.

C. A. Buskirk, T. R. Paxton, R. D. Richardson, J. T. Walker, L. C. Embree and G. Palmer, for appellants.

J. H. Miller, J. E. McCullough and A. P. Twineham, for appellees.

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127	600
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134	180
135	379
136	496
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139	68
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140	177
127	31
148	87
149	477
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153	58
127	31
154	428
154	424
155	145
127	31
169	522
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MITCHELL, J.—The facts upon which the decision in this case depends are undisputed. They show that Samuel Shannon died intestate, in the year 1857, seized of certain real estate in Gibson county. His widow, Louisa Shannon, a second wife, by whom he had no children, and two sons, William W. and Andrew, and a married daughter, Ophelia, children by a former marriage, survived him as his only heirs. As the result of a partition suit, instituted in 1858, what is alleged to be an estate for life in the real estate involved in this controversy, was set off to the widow, as part of the interest to which she was entitled under the statute, in the real estate of her deceased husband. In the same proceeding certain lands were also set off, in fee simple, to each of the other heirs. In 1860, during the lifetime of his step-mother, William W. Shannon, executed a deed, with covenants of warranty, whereby he conveyed, by proper description, the lands set off to him, to his brother Andrew. He also undertook, by the same deed, to convey his interest, or supposed interest, in the lands set off to his step-mother, which interest he described in the following language: "Also, all the reversionary right, title and interest, of the said William W. Shannon in and to sixty acres off the south part of said northeast quarter of said section numbered seventeen; all of said lands being in township numbered two south, range numbered ten west; also, the undivided third part of the south half of lot numbered thirty-three, in the original plat of the town of Princeton, in said county, subject to the dower of Mrs. Louisa Shannon, it being the intention to convey all the estate of said William W. Shannon, set off to him in partition of real estate of Samuel Shannon, deceased, in said sections, and his interest in the lands set off to said Louisa Shannon, as her dower in said partition." The deed contained the following covenants: "The grantors, their heirs and assigns, hereby covenanting with the grantee, his heirs and assigns, that the title so conveyed is free, clear, and unencumbered; that they are lawfully seized of the premises

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aforesaid as of a sure, perfect, and indefeasible estate of inheritance, in fee simple, and that they will warrant and defend the same against all claims whatsoever." The appellant Paul Habig claims title to the interest of William W. and Andrew Shannon, in the lands set off to their step-mother through mesne conveyances from Andrew, who died intestate and unmarried in 1861, after receiving the conveyance from William W., and prior to the death of his step-mother. The appellant Stormont claims title through mesne conveyances from Ophelia Evans and her husband, to the supposed interest of the former in the land set off to her step-mother, the conveyance by Ophelia and her husband having been made in 1868, during the lifetime of the widow, her deed containing full covenants of warranty. Ophelia died in 1876, leaving Alice Dodge and three other children as her heirs.

The widow, Louisa Shannon, died in 1884, and in 1886 William W., the only surviving child of Samuel Shannon, executed a second conveyance, upon a nominal consideration, by which he conveyed his interest in the land set off to his step-mother, to Wm. T. Turner, through whom the appellant John R. Green claims title to the undivided one-half of the tract in dispute.

This suit was brought to obtain partition of the land in dispute by the children of Ophelia Evans, who claim the undivided one-half of the land set off to the widow of their grandfather, Samuel Shannon, their claim being that they take from the widow as heirs, notwithstanding the warranty deed of their mother. Habig, Stormont and Green were made parties.

Upon the foregoing facts the court found that the plaintiffs were the owners of the undivided one-half of the land in controversy; that Green was the owner of an undivided one-third, and that Habig and Stormont were each the

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owners of an undivided one-sixth. Habig, Stormont and Green prosecute this appeal.

It may be observed that by the express terms of section 4 of the act of March 11th, 1889 (Elliott's Supp., sections 423-426), the provisions of this latter act do not apply to any case where the second childless wife had died, and the estate had become vested in the heirs of the deceased husband before the act took effect.

The controversy is to be determined, therefore, according to the statutes in force in 1884, when Louisa Shannon died, and the interest or estate of her heirs, the children of her deceased husband became vested.

It must now be regarded as settled by the decisions of this court, that, under the statute which controlled the judgment in the present case, one-third of the real estate of which a husband died seized descended in fee simple to his widow, free from all demands of creditors, without regard to whether she was the first or second wife, provided, however, if she were a second or subsequent wife without children, there being children alive by a previous wife, the descent of the land which at the husband's death vested in fee simple in his widow, was absolutely restricted to his children. The estate which a widow took in the lands of her deceased husband was precisely the same whether she was a first or second wife, the only distinction being that the statute in certain cases controlled the line of descent, so that in case of a second or subsequent childless wife, the living children of the deceased husband by a former wife, became by compulsion of law the heirs of the second wife at her death, and inherited the lands which the statute cast upon her at the death of her husband. The policy of the law lies upon the surface of the statute, and its eminent justice and propriety are apparent.

It was intended, while accomplishing ample justice to the childless widow, to prevent the possibility of the estate, which presumably the first wife had assisted in acquiring, being cast by inheritance, or otherwise, upon persons who

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might be strangers to her blood, as well as the blood of her husband, to the exclusion of their children whose industry and frugality may have contributed to the acquisition of the property.

The decisions of this court, accepting the statute according to its evident purpose and policy, have settled it firmly as anything can be settled by judicial determination, that the childless widow took an interest equal to the undivided one-third in fee simple in her deceased husband's real estate, and that during her lifetime the children of her husband had no vested estate in the property which descended to her; that they occupied precisely the attitude of other expectant heirs toward the property of their ancestor, except that the ancestor, the childless widow, had no power to defeat the expected inheritance. The question has arisen in almost every conceivable shape, and the rulings uniformly are, that during the lifetime of the widow the husband's children have no interest which can be affected by any order or judgment of a court, nor by a conveyance made by them nor by their guardian, unless it contain covenants of warranty or their equivalent, pursuant to an order of court. *Gwaltney v. Gwaltney*, 119 Ind. 144; *Erwin v. Garner*, 108 Ind. 488; *Thorp v. Hanes*, 107 Ind. 324; *Avery v. Akins*, 74 Ind. 283; *Bryan v. Uland*, 101 Ind. 477, and cases cited.

This is upon the principle which prevails almost universally that judgments affecting the title to real estate, and conveyances without covenants, are ordinarily confined in their operation to the interest held by the parties to the suit or grantors in the deed at the time the judgment is pronounced or conveyance executed, and affect only existing titles and not those subsequently acquired. *Freeman Cotenancy and Part.*, section 532.

Something has been said about the conflict between the earlier and the later decisions of this court, which define the interest which a childless second wife takes, or took, under the statute in the real estate of her deceased husband. There

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is no substantial disagreement in the decisions. In some instances the estate of the wife or widow was described as a life-estate, but the principle that the husband's children by the first marriage take by descent from the childless second wife has never been denied in any case to which our attention has been called.

On the appellants' behalf it is contended that the title to the real estate in question was adjudicated in the partition suit, and that because it was alleged by way of recital in the complaint for partition, and found and adjudged by the court, that Louisa Shannon, as widow of Samuel Shannon, was entitled to an estate for life in the land in dispute, the plaintiffs below are estopped to deny that the children of Samuel Shannon were not the owners of the fee. It is true that after setting out the death of Samuel Shannon in the complaint for partition, and alleging that he died seized of certain real estate, and that he left a childless second wife and three children, who are named by a former marriage as his only heirs, the pleader avers that the widow was entitled, upon the facts stated, to an estate for life, equal in value to the one-third of the real estate of which Samuel Shannon died seized. The averment of the pleader respecting the character and quantity of the estate to which the widow was entitled, was merely a mistaken conclusion of law drawn from the precedent facts, which were accurately and fully set out, and as there were no other pleadings except such as are ordinarily employed in partition proceedings, and no decree except the ordinary one directing that partition be made, and describing the interest of the widow as an estate for life, it can not be said that the respective titles of the parties were put in issue and adjudicated. *Miller v. Noble*, 86 Ind. 527, and cases cited; *Bryan v. Uland*, *supra*; *Avery v. Akins*, *supra*. On the contrary, any one examining the record of the proceedings in partition would find indisputable evidence on the face thereof that the estate which the widow took was a fee simple, with the power of alienation

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restrained and limited, and with the descent fixed by public statute law.

The present case is not distinguishable from *Kenney v. Phillip*, 91 Ind. 511, in which facts strongly analogous to those under consideration were involved. Speaking of the facts which ruled the decision in that case, the court said : "During the lifetime of the children of John Coble, Margaret Coble instituted partition proceedings, and judgment was entered, partitioning the land, awarding to her the life-estate, and to John Coble's children the fee, and this decree is relied upon as estopping her grantee from claiming title. It is the law of this State that an ordinary judgment of partition does not create title, but simply makes division of the land. * * It is also the law, as these cases show, that the judgment in such a case does not operate upon after-acquired titles, and here the reversionary title of Margaret Coble was acquired after the death of John Coble's children. It is no doubt true, that an issue may be framed, directly presenting for decision, the question of title, and when such an issue is framed and directly adjudicated, the judgment will be conclusive."

This doctrine is enunciated in many other decisions of this court, and must now be regarded as a rule of property to be changed only by legislative intervention. *Matthews v. Pate*, 93 Ind. 443; *Fleenor v. Driskill*, 97 Ind. 27.

Title can only be put in issue by appropriate averments in the pleadings. *Luntz v. Greve*, 102 Ind. 173; *Pipes v. Hobbs*, 83 Ind. 43. Where the only issue presented by the pleadings is whether or not there ought to be partition of the land among the several alleged owners, according to their respective interests, the title to the land is not in issue. A decree taken upon issues thus made is conclusive as an estoppel, so far as to settle and bind the present interest of all those who are parties according to the terms of the decree, but it does not operate upon or affect, or estop parties from setting up after-acquired titles.

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Where an existing special title is pleaded and settled by the decree, parties to the record are concluded by the averments in the pleadings, and are estopped to deny the validity of the title pleaded. *L'Hommedieu v. Cincinnati, etc., R. W. Co.*, 120 Ind. 435.

This is the rule in this State, and it is now too firmly settled by our decisions to be departed from without producing confusion in titles to land.

It is insisted next that inasmuch as Ophelia Evans, in her lifetime, conveyed the land by deed containing full covenants of warranty, the plaintiffs are estopped by the covenants in the deed of their ancestor.

Waiving any consideration of the question whether or not a married woman would be estopped from setting up an after-acquired title as against the covenants in a deed executed by her prior to the statute of 1881, it is sufficient to say the plaintiffs do not claim title through their mother. Ophelia Evans never had any vested interest in or title to the land in dispute, her death having occurred before that of her step-mother. Upon her death the plaintiffs, as her children, became the expectant heirs of the childless widow of their grandfather, and upon the death of the widow the law cast the estate immediately upon them, as her compulsory heirs, in the stead of their mother. *Scott v. Silvers*, 64 Ind. 76. Their relationship to Louisa Shannon, the widow of Samuel Shannon, came to the plaintiffs through their mother, Ophelia Evans, but the title to the land did not come through her; that came immediately by descent from Louisa Shannon, wholly unaffected by any conveyance made by their mother, who never had any estate whatever in the land.

The modern rule in respect to covenants seems to be that they affect the grantor only, unless, first, the heir had assets from him, and then only to the extent of the assets; or unless, secondly, the heir claim the land as heir of the grantor. *Carson v. New Bellevue Cemetery Co.*, 104 Pa. St. 575; *Uterback v. Phillips*, 81 Ky. 62; *Bigelow Estoppel*, 389. Both

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elements necessary to affect the plaintiffs, either upon the principles of rebuttal or estoppel, are absent in the present case. So far as appears they neither received assets from their mother, nor do they claim the estate as her heirs.

The deed of an heir apparent, by which he seeks to convey an estate in expectation, may, under some circumstances, operate by way of estoppel against him, but it can not operate to the prejudice of those who, upon his death, prior to that of the ancestor, through him, become heirs of the latter in his stead. *Bohon v. Bohon*, 78 Ky. 408.

A warranty in a deed made by a stranger to the title, who has no estate to which the warranty can attach, is wholly inoperative as against one who does not claim through him. Rawle Covenants (5th ed.), section 254.

The law looks with disfavor upon sales by an heir apparent of his possible or expected interest in the estate of his ancestor during the lifetime of the latter. *McClure v. Raben*, 125 Ind. 139.

It would look with abhorrence upon a transaction, the effect of which would cut off the lawful inheritance of his children in the estate of his father, after his death, when the heir apparent had nothing more than a mere expectation, which he never realized.

The remaining question relates to the effect to be attributed to the deed made by William W. Shannon to his brother Andrew in May, 1860. It is insisted on the one hand that this deed effected a conveyance by way of estoppel, and that the estoppel extends to the entire interest which is now claimed by the appellant John R. Green, through William W., by a later conveyance made in 1886, after the death of the widow. On the other hand, the argument is that the conveyance from William W. to Andrew Shannon, being of the "right, title and interest" of the grantor in the real estate in dispute, is in effect nothing more than a quitclaim deed, that it was inoperative to convey anything more than the interest which the grantor then had, that as it was made

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during the lifetime of the widow, when he had no interest to convey, it left his subsequently acquired title wholly unaffected to pass by the subsequent deed through which Green claims.

The general proposition is abundantly maintained that a deed of release or quitclaim, or a conveyance of the "right, title and interest" of the grantor, even though it be with full covenants of warranty, without designating in the instrument any particular estate, either as owned by the grantor or as conveyed by the deed, operates simply to transfer whatever interest the grantor may have had at that time. *Locke v. White*, 89 Ind. 492, and cases cited; *Bryan v. Uland*, *supra*. The addition of covenants of warranty does not enlarge the granting clause in the deed, the general rule being that the covenants are restrained by and are only coextensive with the granting clause.

The rule in respect to the point in question is thus stated in Rawle Covenants (5th ed.), section 250: "So where the deed, although containing general covenants for title, does not on its face purport to convey an indefeasible estate, but only 'the right, title and interest' of the grantor; there, in cases where those covenants are held not to assure an absolute title, but to be limited and restricted by the estate conveyed, the doctrine of estoppel has been considered not to apply; in other words, although the covenants are as a general rule deemed to be invested with the function of estoppel in passing an after-acquired estate by mere operation of law, yet they will lack that effect when it appears that the grantor intended to convey no greater estate than he was really possessed of." *Hanrick v. Patrick*, 119 U. S. 156 (175).

Where, however, a deed containing covenants, bears upon its face evidence that the grantor intended to convey an estate of a particular description or quality, then the prevailing doctrine is, even though the covenants may be technically imperfect and informal, the grantor and those claim-

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ing through him, will be bound in respect to the estate described to the extent, at least, of being estopped to say that the grantor was not seized of the particular estate at the time of the conveyance. *Nicholson v. Caress*, 45 Ind. 479 (485); *Van Rensselaer v. Kearney*, 11 How. 297 (301); *Hannon v. Christopher*, 34 N. J. Eq. 459.

The reason is, that if, upon the face of the deed, there is an express or implied representation that the grantor is presently seized of the particular estate which he assumes to convey, and warrants, it will be presumed that the bargain between the parties proceeded upon the footing that he owned the estate described. If it turns out that he is not the owner, whether it result from honest mistake or otherwise, he will be estopped from setting up an after-acquired title of the same character as that described, to defeat his own previous grant. Tiedeman Real Property, section 727.

Turning to the deed in question, and by fair implication it appears upon the face of the instrument that the grantor assumed to convey and warrant the title to a reversionary interest equal to the undivided one-third of the real estate previously set off to the widow. It is evident that the parties dealt upon the footing that the grantor bargained and sold, and that the grantee acquired by the deed, a one-third interest in the land in dispute, subject to the estate, or supposed estate, of the widow. In equity and good conscience the grantor, and all those claiming through him, should now be estopped to assert the contrary.

As the judgment of the court below was, in all respects, in consonance with the principles herein enunciated, that judgment is, in all things, affirmed, with costs.

Judgment affirmed.

Filed Sept. 20, 1890; petition for a rehearing overruled Jan. 28, 1891.

Bryan *et al.* v. Watson.

No. 15,603.

BRYAN ET AL. v. WATSON.

SUNDAY LAW.—Subscriptions to Church.—Work of Charity.—A subscription made on Sunday, to liquidate an indebtedness of a church contracted in the erection of a building to be used as a place of worship, is not "common labor" within the inhibition of the statute (section 2000, R. S. 1881), but is a work of charity, and is valid and binding. *Callett v. Trustees, etc.*, 62 Ind. 365, overruled.

From the Marion Superior Court.

A. F. Denny, for appellants.

S. M. Shepard, for appellee.

BERKSHIRE, J.—The appellants are the trustees of the South Street Baptist Church, in the city of Indianapolis. This action was brought to enforce a subscription made by the appellant for the benefit of said church society.

When the appellee made the subscription here in question he was a member of the said society.

The complaint is in two paragraphs, one counting on a verbal, and the other on a written subscription.

The object of the subscription, as alleged in the complaint, was to liquidate an indebtedness of said church contracted in the erection of a building to be used as a place of worship.

At the time the appellee made his subscription other persons also made subscriptions, and upon the faith of the subscription made by the appellee paid the amounts subscribed by them.

After the cause was put at issue there was a jury trial, and by direction of the court, a verdict returned for the appellee, and upon the verdict he recovered judgment.

Counsel for the appellants rests his case upon two propositions, which relieves us from considering other questions presented by the record. These two propositions are: (1). That a subscription to aid a religious society, made on Sunday, is valid and binding; and (2), if not valid in the begin-

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ning the taint may be wiped out by ratification on a secular day.

The conclusion to which we have arrived, as to the first proposition, makes it unnecessary that we consider the second.

The subscription rests upon a valuable consideration, and may be enforced as an executory contract, unless the transaction of which it is the outgrowth is one which section 2000, R. S. 1881, denounces. *North-Western, etc., Conference v. Myers*, 36 Ind. 375; *Higert v. Trustees, etc.*, 53 Ind. 326; *Petty v. Trustees, etc.*, 95 Ind. 278.

Section 2000, *supra*, reads thus: "Whoever, being over fourteen years of age, is found on the first day of the week, commonly called Sunday, rioting, hunting, fishing, quarrelling, at common labor, or engaged in his usual avocation (works of charity and necessity only excepted) shall be fined in any sum not more than ten nor less than one dollar."

In our opinion this statute does not condemn the transaction here under consideration, and we rest our conclusion upon two grounds:

First. The transaction to which the subscription relates was not in any sense a work of "common labor," within the meaning of the statute.

Second. What was done was to aid a work of charity.

Our conclusion is not in conflict with decided cases which hold that contracts which relate altogether to the everyday affairs of life fall within the inhibition contained in the statute, as being acts of "common labor." The phrase "common labor" can not be given an exact and accurate definition; this is impossible, in the very nature of things.

The most that the courts can do is to determine, as cases arise, whether or not the transaction, or act, involved in a given case falls within the legislative intention, as expressed in the statute.

One thing, however, may be safely assumed, and that is that it was not the legislative intention that the phrase

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“common labor” should be restricted in its meaning to mere manual labor.

The execution of ordinary contracts, and the transactions to which they relate, may well be regarded as acts of “common labor,” within the meaning of the statute.

Such transactions belong to the ordinary business affairs of life, and no doubt were as much in the legislative mind when the statute was enacted as the work of the farmer in his field, or the mechanic in his shop, or the common laborer upon a public improvement.

But cases of the character of the one under consideration belong to a different class altogether. The purpose, or end in view, is not financial or wordly gain, but to advance the cause of Christianity, and to elevate the moral standard of the particular community or locality. *Rapp v. Reehling*, 124 Ind. 36.

One who engages in a mere business transaction on Sunday, such as the execution of a conveyance to land, of a promissory note, or other contract, violates the statute in question, and is guilty of a misdemeanor, and subject to a criminal prosecution the same as if he had engaged in any other act of common labor; but whoever imagined that persons engaged in church collections, either as solicitors or contributors on Sunday, were under the condemnation of the statute?

If, however, the contention of the appellee is to be adopted, then every collection made on the Sabbath day, in connection with religious services, is an act of *common labor*, and unlawful. And if collections, which are paid as the solicitors pass through the congregation, do not fall within the statute, neither do contributions promised to be paid at a future time, because the circumstances and purposes under and for which they are made are in nowise different.

The statute in question must apply as well to cash collections as those made to be paid in the future; for, as we have already intimated, it is a criminal statute, and recognizes no distinction between executed and executory contracts.

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If the trustees of a religious society were prosecuted for a violation of the statute in making collections for the benefit of their society on Sunday, it would be no justification that all persons solicited made cash payments.

Unless the appellants were liable to a criminal prosecution for what they did in the way of taking a collection at the time the appellee made his subscription, the subscription does not fall within the inhibition of the statute as an act of common labor; and we do not think they were guilty of any offence for which they were subject to criminal prosecution.

That the subscription was made in aid of a charitable enterprise we think may also be successfully maintained.

The purpose for which it was taken falls within the definition placed upon the word "charity," by courts of last resort in other States, and of very high standing for legal learning. *Doyle v. Lynn*, 118 Mass. 195; *Allen v. Duffie*, 43 Mich. 1; *Dale v. Knepp*, 98 Pa. St. 389. See, also, the word "charity," and its definitions in Webster, Worcester, and the Century dictionaries.

The conclusion to which we have come overrules *Catlett v. Trustees, etc.*, 62 Ind. 365, which properly enough controlled the rulings of the trial court as to the question we have considered. We do not think that case sound on principle, and it is against the great weight of authority. See cases cited last above.

For the error indicated, this case must be reversed.

Judgment reversed, with costs.

Filed Jan. 28, 1891.

Buck v. Hughes.

No. 14,736.

BUCK v. HUGHES.

CONTRACT.—*Husband and Wife.*—*Contract of Wife.*—*Validity of.*—A contract made by a married woman with the vendee of real estate, which provides that interest on the purchase-price due her shall be paid to her during life, and that the principal shall be paid at her death to her heirs, but that in the event of the death of her husband, or her separation from him, it shall be paid to her, is a valid contract.

SAME.—*Action on.*—*Pleading.*—To a suit for such purchase-price an answer alleging that the contract was reduced to writing, stating the terms upon which payment was to be made, and that the vendee was not in default, and that the obligation was not due, and specifically alleging that he had made no other contract in relation to the payment for the land, presents a good defence.

JUROR.—*Misconduct.*—*New Trial.*—Where a juror, when asked if he had served as a juror in a former trial of the same case, answered that he had not, and thereupon was accepted as a juror, without objection from the plaintiff, who was present at the former trial and testified as a witness, and knew that the juror had served on the former trial, when he answered that he had not, a new trial will not be granted for the misconduct of the juror, as it was the plaintiff's duty to object at the time.

From the Montgomery Circuit Court.

G. D. Hurley and M. E. Clodfelter, for appellant.

P. S. Kennedy, S. C. Kennedy, B. T. Ristine and H. H. Ristine, for appellee.

OLDS, C. J.—This action was brought by the appellant against the appellee for the sum of three hundred dollars, the purchase-price of certain real estate sold and conveyed by the appellant to the appellee.

The appellee answered in two paragraphs, the first a general denial; the second paragraph admits the purchase of the land, but avers that the consideration for said land was his written obligation to the plaintiff by which he bound himself to pay to her eight per cent. interest on the sum of three hundred dollars during her lifetime, and at her death he was to pay the said sum of three hundred dollars to the heirs of the plaintiff; a copy of which written obligation is filed with

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the paragraph of answer, marked "Exhibit A," and made a part of the same. It is further averred that the defendant has paid the eight per cent. to the plaintiff, from year to year as the same became due, and she has accepted the same, and that defendant never promised any other consideration for the plaintiff's interest in the land, and never had any other agreement, or contract, with the plaintiff concerning said land than the one stated in the answer.

The written instrument, a copy of which is set out with the answer, is as follows:

"This agreement between David W. Hughes and Lavina Buck, witnesseth: That said Hughes is indebted to the said Buck in the sum of three hundred dollars, the same being the purchase-money of her interest in certain real estate heretofore sold and conveyed by said Buck to said Hughes, and which is to be paid by said Hughes only upon the terms and conditions herein set forth: the said Hughes is to pay said Buck interest at the rate of eight per cent. per annum upon said sum, and to pay the same at the end of each and every year. It is further agreed that said Buck shall, in no event, sell, assign, or transfer, to any other person, this contract, or her interest therein, and that the principal sum of \$300 shall not be paid during her life, except on the conditions hereinafter set forth; and in case it shall not be paid to her in her life it shall, at her death, belong to her children in equal proportions. It is further agreed that while she lives with her husband, Samuel Buck, the said sum of \$300 shall not be collected, or collectible, but he shall make provision for her; and in case of his death, or for any reason she shall be dependent on herself for support, and shall need the principal sum of \$300, then, in that event, she shall be paid by the said Hughes the whole or such part of said principal sum as shall be necessary for her support, or reasonable care; but in no event shall said sum of \$300 be due and payable while she lives with said Samuel Buck as his wife. DAVID W. HUGHES."

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A demurrer was filed to this paragraph, and overruled, and exceptions reserved, and the ruling is assigned as error.

There was no error in overruling the demurrer. The averments of the paragraph show that the contract and obligation for the payment of the land was reduced to writing, stating the terms upon which payment was to be made, and that he was not in default, and that the obligation was not due, and specifically alleging that he made no other contract in relation to the payment for the land. It is contended that the contract itself is void, for the reason that it is payable upon the condition that the appellant separate from her husband. We do not think the contract bears any such construction. It is a contract which the appellant had the right to make; she had three hundred dollars due to her for the sale of her real estate, and she takes a contract by which it shall be payable at her death to her heirs, but reserves the right, in case of the death of her husband, or in case she should separate from her husband and become dependent upon herself for support, that the sum shall, in that event, become due and payable to her. Her husband is legally bound to furnish her support, and she had the right to preserve her separate means for the benefit of her children. *Price v. Jones*, 105 Ind. 543.

There was a verdict and judgment for appellee, and the appellant filed a motion for a new trial, which was overruled; and she excepted, and this ruling is assigned as error.

The first reason urged for a new trial is that the court erred in admitting in evidence the contract set out with the answer. This question is disposed of by what we have said in regard to the ruling on the demurrer to the answer.

It is next contended that a new trial should have been granted on account of the misconduct of William E. Stone, one of the jurors. It appears there had been a former trial between the same parties in the same court, involving, to some extent, the same transaction. In the examination of the jurors in this case as to their competency to sit as jurors, the

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juror Stone was asked if he had ever served as a juror in that court in a cause between these same parties, and he answered that he had not, and thereupon he was accepted as a juror.

As a general rule, parties may rely, and have a right to rely, on the statements of a juror, and are not required to institute an investigation as to the truth of the statements of a juror before accepting him as such. But a party has the right, if he knows at the time of facts making the juror incompetent, to present them to the court, and have the question of the juror's competency heard and passed upon by the court before entering upon the trial. In this case there had been a former trial between these same parties involving the same facts, in which there had been a verdict returned for the appellant. The affidavits affirmatively show that the appellant was present in person at the former trial, and testified as a witness. Being present in person at the former trial, the presumption is she knew the jurors that passed upon her case. It is also shown that she was present at the trial of this cause, and testified as a witness. It is not shown but that she had full knowledge of the fact that the juror had served as a juror on the former trial when he answered that he had not; and if she had it was her duty to present her objection to his serving as a juror at that time. We do not think there is any such showing as entitles the appellant to a new trial on account of the misconduct of the juror.

There is no error in the record.

Judgment affirmed, with costs.

Filed Jan. 28, 1891.

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134	468
135	366

127	50
138	424
138	499
139	438

127	50
143	466
127	50
146	53

127	50
148	63
150	522
151	302
151	315
151	568
152	300
152	551

127	50
153	368

127	50
157	700

127	50
159	282
159	668

127	50
160	149

127	50
161	9

127	50
165	112

127	50
166	298

166	299
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169	253
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ROGERS ET AL. v. LEYDEN.

MASTER AND SERVANT.—Known Danger.—Assumption of Risk.—An employee assumes all the risks incident to the service into which he enters, but where the negligent breach of duty on the part of the employer augments the hazards of the service the employee may, unless by voluntarily continuing in the employer's service he has assumed such danger, hold the employer accountable for an injury caused by such negligent breach of duty.

SAME.—Concurrent Negligence of Master and Fellow-Servant.—Where the master is negligent he is responsible, although the negligence of a fellow-servant may have concurred in bringing injury upon the plaintiff.

SAME.—Continuance in Service After Danger Increased.—Instruction.—An employee who voluntarily remains in his employer's service after its danger has been increased by the employer's negligence, can not recover, since he assumes the risk from such known danger; but this rule does not apply where the employer promises to take steps to remove the threatened danger. Hence, it is not error to refuse an instruction unqualifiedly asserting that if the employee remains in the service after he acquires knowledge of the increased danger he can not recover. Such instruction is erroneous also for the reason that knowledge that a master is not discharging his duty in making safe the place where he requires his employees to work will not defeat a recovery by an employee injured by the master's neglect of duty, unless it is inferable that the breach of duty augmented the dangers of the service.

SAME.—Both the question as to whether there was a negligent breach of duty by the employer, and the question as to whether such a breach of duty increased the dangers of the service, are, generally, questions of fact. If only one inference can be drawn from the facts, and the facts are uncontested, the question may be one of law; but where the facts are controverted, or where more than one inference may be reasonably drawn from the facts, the question is, generally, one of fact for the jury. Where more than one inference may be drawn from the facts established by the evidence, the questions as to what inferences shall be deduced are, usually, questions of mingled law and fact, and must be submitted to the jury under appropriate instructions as to the governing rule of law.

SAME.—Contributory Negligence—Assumption of Risk.—Instruction.—Where it is a material question whether the employee, having knowledge of the danger, assumed it as one of the risks incident to his service, an instruction treating the employee's knowledge as affecting only the question of contributory negligence, while erroneous, is not ground for rever-

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sal, where other instructions treat his knowledge as affecting the assumption of the risk, and the jury find specially that the employee did not have knowledge of the increased peril.

VERDICT.—*Answers to Interrogatories.*—The general verdict will stand, unless the antagonism between it and the special answers to interrogatories is so clear and strong as to preclude a reconciliation.

INSTRUCTIONS TO JURY.—*Improperly Expressed.*—*Refusal of Request.*—Unless the instruction asked is expressed in proper terms the trial court may refuse to give it; it is not bound to modify or amend it.

From the Gibson Circuit Court.

J. W. Ogdon, M. F. Burke, W. Hefferman and C. A. Buskirk, for appellants.

J. H. Miller, J. E. McCullough, E. P. Richardson and A. H. Taylor, for appellee.

ELLIOTT, J.—The appellants were the owners of a coal mine and the appellee was one of their employees, engaged in mining coal. While engaged in the line of his service, and performing a duty assigned him by his employers, he was injured by the fall of an overhanging part of the roof of the mine. There is evidence tending to prove that the employers knew of the unsafe condition of the mine, and that they had been requested to make it safe, but negligently failed to take steps to make the mine safe or to avert the threatened danger.

It is established law that an employer is bound to use ordinary care and skill to make and keep the place where his employees are required to work in a reasonably safe condition. *Louisville, etc., R. W. Co. v. Corps*, 124 Ind. 427; *Taylor v. Evansville, etc., R. R. Co.*, 121 Ind. 124; *Cincinnati, etc., R. W. Co. v. Lang*, 118 Ind. 579; *Brazil, etc., Co. v. Young*, 117 Ind. 520; *Louisville, etc., R. W. Co. v. Sandford*, 117 Ind. 265; *Cincinnati, etc., R. R. Co. v. McMullen*, 117 Ind. 439; *Pennsylvania Co. v. Whitcomb*, 111 Ind. 212; *Indiana Car Co. v. Parker*, 100 Ind. 181; *Cunningham v. Union Pac. R. W. Co.*, 4 Utah, 206; *Consolidated Coal*

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Co. v. Wombacher (Ill.), 24 N. E. Rep. 627; *Johnson v. Spear*, 76 Mich. 139 (15 Am. St. Rep. 298).

It is, however, equally well established that an employee assumes all the risks incident to the service into which he enters. *Louisville, etc., R. W. Co. v. Sandford, supra*; *Indianapolis, etc., R. W. Co. v. Watson*, 114 Ind. 20 (5 Am. St. Rep. 578).

But where the negligent breach of duty on the part of the employer augments the hazards of the service, the employee may, unless by voluntarily continuing in the employer's service he has assumed such danger, hold the employer accountable for an injury caused by such negligent breach of duty. It is the risk of ordinary perils incident to the service that the employee assumes, not the hazard of extraordinary risks added by the failure of the employer to perform the duty enjoined upon him by law. An employer who assigns an employee to work in a particular place, or directs him to perform a special duty, must use reasonable care and skill to make it reasonably safe for the employee to perform the duty assigned to him. *Cincinnati, etc., R. W. Co. v. Lang, supra*, and authorities cited. In deciding a case somewhat similar to the present, the Court of Appeals said: "When the master ordered the intestate to perform his work as a machinist in the trenches opened and prepared for him, he had a right to assume that the place had been made reasonably safe by the master through other and competent servants employed by him." *Kranz v. Long Island R. R. Co.*, 123 N. Y. 1. Many of the instructions given by the trial court substantially embody the principles we have stated, and so far as they do this there is, of course, nothing in them of which the appellants can justly complain.

If it were conceded that the "mine boss" was the fellow-servant of the appellee, and not the representative of the employer, still his negligence would not absolve the employer, although it may have concurred with the negligence of the latter in producing the injury. Where the master is

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negligent he is responsible, although the negligence of a fellow servant may have concurred in bringing injury upon the plaintiff. An employer must answer for his own breach of duty to his employees, even though one of his employees was also guilty of negligence which contributed to the wrong done to the injured employee. *Cincinnati, etc., R. W. Co. v. Lang, supra*; *Coppins v. New York Central R. R. Co.*, 25 N. E. Rep. 915; *Franklin v. Winona, etc., R. R. Co.*, 37 Minn. 409 (5 Am. St. R. 856); *Farren v. Sellers*, 39 La. Ann. 1011 (4 Am. St. R. 256); *Cayzer v. Taylor*, 10 Gray, 274 (69 Am. Dec. 317); *Paulmier v. Erie R. R. Co.*, 34 N. J. L. 151; *Booth v. Boston, etc., R. R. Co.*, 73 N. Y. 38 (29 Am. R. 97); *Myers v. Hudson Iron Co.*, 150 Mass. 125 (15 Am. St. R. 176.)

This rule rests on solid principle. It is no more than bare justice to compel a wrong-doer to answer for the proximate consequences of his own negligence, and it would be to the last degree unjust to permit him to escape responsibility upon the ground that some one else was also guilty of culpable negligence. The law can not be reproached with such injustice as is involved in the assertion that a wrong-doing employer may shelter himself behind the act of one of his employees who, like himself, has been guilty of an actionable wrong.

The essential part of the fourth instruction given by the trial court reads thus: "The fact, if it is a fact, that Leyden had knowledge that the roof was in a dangerous condition does not necessarily preclude a recovery by the plaintiff. Knowledge is always an important matter for consideration, but it does not always establish contributory negligence. If one undertakes to pass a known danger so great that no person of ordinary prudence would voluntarily encounter it, then he is guilty of contributory negligence, for no person possessing knowledge of danger has a right to go into a place which ordinarily prudent men would avoid. If, however, the danger is known, but it is not of such a character

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as that prudent men would not decline to encounter it, then the attempt to pass it is not, in and of itself, such negligence as will defeat the action. But if he does attempt to pass it, he must exercise care proportioned to the known danger." In the proper case, or as properly restricted to the single question of contributory negligence, there would be no difficulty in sustaining this instruction. *Ohio, etc., R. W. Co. v. Trowbridge*, 126 Ind. 391, and cases cited. We do not doubt that it correctly expresses the law as applied to a case where the question is one of contributory negligence, but here the question is not exclusively one of that character, for a material question is whether the appellee, having knowledge of the danger, assumed it as one of the risks incident to his service. The law upon this point is well settled, for it has often been held that where the danger is known, although it is attributable to a breach of duty on the part of the employee, the employee assumes it as one of the risks of his service if he voluntarily remains in the employer's service after he has acquired a knowledge of the danger. *Louisville, etc., R. W. Co. v. Corps, supra*; *Louisville, etc., R. W. Co. v. Sandford, supra*; *Brazil, etc., Co. v. Young, supra*; *Indianapolis, etc., R. W. Co. v. Watson, supra*; *Indiana, etc., R. W. Co. v. Dailey*, 110 Ind. 75; *Lake Shore, etc., R. W. Co. v. Stupak*, 108 Ind. 1; *Philadelphia, etc., R. R. Co. v. Hughes*, 119 Pa. St. 301; *Wilson v. Winona, etc., R. R. Co.*, 37 Minn. 326; *Gaffney v. New York, etc., R. R. Co.*, 15 R. I. 456. An exception to the general rule exists, but exists only where the employer promises to take measures to remove the danger. *Indianapolis, etc., R. W. Co. v. Watson, supra*.

It may, perhaps, be true that if the instruction stood alone we should be compelled to reverse the judgment, inasmuch as it does, in itself, and considered apart from the other instructions, probably attribute an improper effect to the element of knowledge on the part of the employee, in that it treats his knowledge as affecting only the question of con-

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tributory negligence, whereas the element of knowledge may have a different effect, and may control a different question. The question which the element of knowledge often controls, as is evident from what we have said, is the question whether the danger known to the employee became, by his voluntary continuance in his employer's service, one of the risks assumed by him as an incident of his service. In other instructions, however, the effect of knowledge on the part of the employee is fully and clearly stated, and we are not prepared to hold that the single instruction misled the jury. The instruction is, in part at least, directed to the question of contributory negligence, and contributory negligence is an element of such cases as this; so that although it is perhaps true that the language used in the instruction is too broad, still, we can not say that the instruction when read, as it must be, in connection with the other instructions, carried the jury astray. It appears, moreover, from the answers to interrogatories that the appellee did not have knowledge of the increased peril due to his employer's breach of duty; hence, it is evident that the jury could not have been misled. It is a familiar rule that an appellant must affirmatively show two things: an erroneous ruling, and that harm resulted from it. *Perkins v. Hayward*, 124 Ind. 445. We can not, in the condition of the record, reverse the judgment because of the defect in the instruction in question, for we can not decide that it affirmatively appears that there was material error prejudicial to the appellant. Considering the element of contributory negligence to which the instruction refers, and considering, also, the other instructions, and the answers to interrogatories, we have no doubt that it is our duty to affirm that there was no such error as warrants a reversal of the judgment.

The rule that the court is not bound to give an instruction unless it is correct as it is written, is well settled, and, under this rule, it has been often held that unless the instruction as asked is expressed in proper terms, the court may refuse to

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give it. As has been decided by this and by other courts, a trial court is not bound to modify or amend an instruction asked by a party. *Lawrenceburgh, etc. R. R. Co. v. Montgomery*, 7 Ind. 474; *Roots v. Tyner*, 10 Ind. 87; *Goodwin v. State*, 96 Ind. 550, *vide* p. 566, and authorities cited. This rule justified the court in refusing the second instruction asked by the appellant, for that instruction, in the terms in which it was expressed, was incorrect. It is true, as a general rule, that an employee who remains in his employer's service after its danger has been increased by the employer's negligence, can not recover, since he assumes the risk from such known danger; but that rule does not apply to a case where the employer promises to take steps to remove the threatened danger. *Indianapolis, etc., R. W. Co. v. Watson*, *supra*.

It follows from this rule that it is not error to refuse an instruction unqualifiedly asserting that if the employee remains in the service after he acquires knowledge of the increased danger he can not recover. But the objection suggested is not the only one. It does not necessarily follow that knowledge that a master is not discharging his duty in making safe the place where he requires his employees to work will defeat a recovery by an employee injured by the master's neglect of duty; to produce this result it must be also inferable that the breach of duty augmented the dangers of the service. An employee may know that the employer is not performing his duty, and yet not know that the perils of his service are augmented. It is not, it is true, necessary that the fact that the perils of the service were increased should be established by direct evidence; it is sufficient if there be evidence from which that fact can be reasonably inferred. Both the question as to whether there was a negligent breach of duty by the employer, and the question as to whether such a breach of duty increased the dangers of the service, are, in the great majority of cases, questions of fact. *Hawley v. Northern Central R. W. Co.*, 82 N. Y. 370;

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Thomas v. Quartermaine, 18 Q. B. D. 685; *Louisville, etc., R. W. Co. v. Corps*, 8 Lawyers' Ann. Rep. 636, note.

If the danger is so apparent that an ordinarily prudent man would have observed and heeded it, then, it is one which the employee assumes, if with knowledge of its existence, and without any promise on the master's part to remove the danger, he voluntarily continues in the service of his employer. This, as we have seen, is the doctrine of our cases, and it is the doctrine of many other courts. *Reitman v. Stolle*, 120 Ind. 314; *Jenney, etc., Co. v. Murphy*, 115 Ind. 566; *District of Columbia v. McElligott*, 117 U. S. 621; *Leary v. Boston, etc., R. R. Co.*, 139 Mass. 580; *Eureka Co. v. Bass*, 60 Am. Rep. 152; *Woodley v. Metropolitan R. W. Co.*, 2 Ex. Div. 384.

If only one inference can be drawn from the facts, and the facts are uncontested, the question may be one of law; but where the facts are controverted, or where more than one inference may be reasonably drawn from the facts, the question is generally one of fact for the jury. *Hough v. Railway Co.*, 100 U. S. 213; *Wallace v. Western, etc., R. R. Co.*, 2 Am. St. Rep. 346; *Baltimore, etc., R. R. Co. v. Walborn, post*, p. 142. In whatever form the question of negligence arises it is ordinarily one for the jury wherever it involves a decision of a question of fact.

In cases where there may be more than one inference drawn from the facts established by the evidence, the questions as to what inferences shall be deduced are usually questions of mingled law and fact, inasmuch as they must be submitted to the jury under appropriate instructions as to the governing rule of law. In such cases the court instructs as to the law, and the jury, under the law as instructed by the court, determines the questions of fact. A long line of cases affirms and enforces this rule. *Gagg v. Vetter*, 41 Ind. 228 (13 Am. R. 322); *Pittsburgh, etc., R. R. Co. v. Nelson*, 51 Ind. 150; *Louisville, etc., R. W. Co. v. Richardson*, 66 Ind. 43; *Louisville, etc., R. W. Co. v. Sterens*, 87 Ind. 198; *Lou-*

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erville, etc., R. W. Co. v. Krinning, 87 Ind. 351; *Pittsburgh, etc., R. R. Co. v. Spencer*, 98 Ind. 186, and cases cited p. 190; *City of Indianapolis v. Cook*, 99 Ind. 10, and cases cited p. 14; *Chicago, etc., R. R. Co. v. Ostrander*, 116 Ind. 259. In the case last cited it was said: "It has practically become a legal maxim in this State that negligence is a mixed question of law and fact, and is a question of law where the facts are undisputed, and the inference to be drawn from them unequivocal." It was, therefore, proper to submit, with correct directions as to the law, the question whether there was negligence on the part of the employer as well as the question whether the employee was guilty of negligence in not discovering the employer's breach of duty and ascertaining its result. The question whether a plaintiff is or is not guilty of contributory negligence is, it may be proper to add, generally one of fact, for the principles declared in the cases to which we have referred rule cases where the question is one of contributory negligence. *Hawkins v. Johnson*, 105 Ind. 29.

An employee has a right to presume that his employer has discharged his duty, but this rule does not go to the extent of exempting him from the duty of exercising reasonable care. He can not excuse himself from the duty of making a prudent and reasonable use of his faculties, or of heeding, with due care, facts open and visible to ordinary observation. He is not bound to exercise unusual care to discover defects caused by his employer's negligence, but he is bound to conduct himself with reasonable care and prudence. *Pennsylvania Co. v. O'Shaughnessy*, 122 Ind. 588; *Cincinnati, etc., R. W. Co. v. Lang*, *supra*; *Louisville, etc., R. W. Co. v. Wright*, 115 Ind. 378; *Bradbury v. Goodwin*, 108 Ind. 286; *Louisville, etc., R. W. Co. v. Buck*, 116 Ind. 566, and cases cited p. 573; *Reitman v. Stolte*, 120 Ind. 314, see p. 317.

Whether the appellee did use due care to ascertain the dangers of his working place was in this instance properly submitted to the jury by the instructions of the trial court,

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and it was not error to refuse those asked by the appellants. *Lake Shore, etc., R. W. Co. v. Stupak*, 123 Ind. 210.

The trial court did not err in refusing to enter judgment upon the answers to the special interrogatories propounded to the jury. A general verdict necessarily embodies the decision of the jury as to the right of the whole case upon the law and the evidence, while answers to interrogatories find only upon special questions of fact, and hence it is no more than reasonable and just to hold, as it has often been held, that the general verdict will stand unless the antagonism between it and the special answers is so clear and strong as to preclude a reconciliation. *Ohio, etc., R. W. Co. v. Trowbridge, supra*; *Town of Poseyville v. Lewis*, 126 Ind. 80; *Graham v. Payne*, 122 Ind. 403; *Indianapolis, etc., R. W. Co. v. Lewis*, 119 Ind. 218; *Smith v. Heller*, 119 Ind. 212; *Grand Rapids, etc., R. R. Co. v. Ellison*, 117 Ind. 234; *Chicago, etc., R. R. Co. v. Ostrander, supra*; *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460; *Redelsheimer v. Miller*, 107 Ind. 485. There is no such antagonism between the general verdict and the special answers returned by the jury in this case.

Judgment affirmed.

Filed Jan. 17, 1891.

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SATTERWHITE *v.* SHERLEY ET AL.

QUIETING TITLE.—*Decree Establishing Boundary Line.*—In a suit to quiet title where the complaint describes the land, alleges that the defendant is claiming an interest in it, and asks for judgment, and a decree is rendered quieting title and establishing the line between the parties to the suit, such decree is binding upon all the parties and those claiming title through them.

From the Morgan Circuit Court.

Satterwhite *v.* Sherley *et al.*

W. R. Harrison, for appellant.

D. W. Grubbs, M. H. Parks, G. A. Adams, J. S. Newby
and *W. S. Sherley*, for appellees.

OLDS, C. J.—This is an appeal from the judgment of the Morgan Circuit Court, approving and affirming a survey of land, and establishing a dividing line between lands of appellant and appellee.

We do not deem it necessary to state the facts in the case more fully than is necessary to decide the particular legal question involved. The appellant and appellee are adjoining land owners, each owning a tract of land in the northwest quarter of section 4, township 11 north, of range 1 east. These tracts were respectively purchased by William H. Craig and John Sims, from David Scott, administrator of the estate of Joseph Lewis, in 1834. The deed to John Sims was for a tract fifty rods wide, from north to south, describing it as follows: Commencing at the northwest corner of section four; running thence east sixty-four (64) rods to the west line of the original plat of the town of Martinsville; thence south fifty rods; thence west sixty-four rods; thence north fifty rods to the place of beginning. The deed to Craig describes the land by commencing at the southeast corner of the land sold to John Sims, which would make it fifty rods from the north line of section four.

The title of the present owners to the respective tracts is derived by descent and mesne conveyance from John Sims and William H. Craig.

William H. Craig having died, and partition of his estate having been made between his widow, Isabella Craig, and his heirs, and the widow having died, Noah J. Major was appointed as her executor. Major, as such executor, brought suit in 1882 to quiet title to a certain parcel, or tract, of land alleged to have been owned by the deceased Isabella Craig, Lafayette Sims being at that time the owner of the John Sims tract, and he was made a party to that suit, in

Satterwhite v. Sherley *et al.*

which it was alleged that the north boundary of the land so owned by said Isabella Craig was fifty rods south of the north line of said section four, and a decree was entered in said cause quieting the title to said land ; an order was made for the sale of the same, and the land sold by Major, executor, and the appellant became the purchaser. The appellees derive title from Lafayette Sims, who was a party to that suit.

The decree and judgment in the case of Major, executor, against Sims *et al.*, fixed and settled the line between the parties to such suit, and those claiming under and through them, and established the north line of the tract owned by Mrs. Craig to be fifty rods from the north line of section four. This survey is being made to fix the line between the appellant and appellee under their respective titles. The survey appealed from fixes the line some fifty-two rods south of the north line of section four. This is arrived at by the surveyor and sustained by the court by ignoring the judgment quieting the title and taking some former survey had between the original owners about 1860. It is conceded by counsel for appellees that the judgment is erroneous, if the judgment in the case of *Major v. Sims et al.* is binding upon the former owner, Lafayette Sims. But it is contended by counsel that the suit by Major was not to quiet title against Sims, but to correct a mistake made in a partition proceeding between the heirs of William A. Craig, deceased. Counsel make this general claim, and refer to the complaint as supporting it, but give no reason upon which such contention can be sustained ; and, certainly, no such contention can be maintained. The complaint describes the land, and alleges that Sims is claiming some interest in it, and asks for judgment against him ; and a decree is entered up, in due form, quieting the title, and forever enjoining and restraining the defendants from ever setting up title to the same, etc.

When Sims was made a party to that suit it was his duty to look after his interest. If he was claiming a tract of land

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extending more than fifty rods in width, it was his duty to set up his title, and litigate the question in that suit.

The judgment is binding upon all the parties to it, and those claiming title under and through them, and having been disregarded by the court, the finding is not sustained by the evidence, and is contrary to law. The appellant was entitled to have his line established in accordance with the decree, or to have the survey set aside, and the judgment must be reversed.

Judgment reversed, with costs.

Filed Nov. 25, 1890; petition for a rehearing overruled Jan. 30, 1891.

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No. 14,704.

WHITLOCK v. THE CONSUMERS GAS TRUST COMPANY.

INJUNCTION.—*Pleading.*—*Answer.*—In an injunction proceeding to restrain a natural gas company from laying its pipes on the land of the plaintiff, an answer denying the ownership of the plaintiff and asserting title in a third person, from whom the defendant had permission to enter upon the land, is good.

SAME.—*Evidence.*—*Nature of Threatened Injury.*—Evidence that the plaintiff had acquiesced in the occupancy of the land, and that she had offered to receive a certain compensation for allowing the defendant to construct its line of pipe, is competent, as tending to show the nature and extent of the threatened injury sought to be restrained.

SAME.—*Evidence.*—A deed executed by plaintiff's grantor to a third person, conveying an interest in the land, is properly admissible in evidence as showing the character of the injury.

SAME.—*Finding of the Jury.*—*Court May Disregard.*—An injunction proceeding is one of exclusive equitable cognizance, and the trial court is not bound by the finding made by the jury.

From the Hamilton Circuit Court.

A. F. Shirts and G. Shirts, for appellant.

W. P. Fishback and W. P. Kappes, for appellee.

ELLIOTT, J.—The appellant avers that she is the owner

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of the land described in her complaint, and that the appellee threatens to enter upon it and lay therein pipes for the transportation of natural gas. The prayer is for an injunction. The appellee alleges in the first paragraph of the answer that it is engaged in the business of supplying natural gas to the citizens of Indianapolis; that it owns and maintains a line of pipe for that purpose, and that the inhabitants of Indianapolis are dependent upon it for their supply of fuel and light; that it is solvent and able to pay all of its liabilities; that at no time has it entered upon or intended to enter upon any lands belonging to the plaintiff; that by a license and right to do so from the Midland Railway Company it did enter upon the right of way owned and occupied by the company for its track and did construct a line of pipe thereon, which right of way adjoins the land described in the complaint; that the right of way belonged to and was in the possession of the railway company by virtue of a deed executed by Sarah Guilkey, May 1st, 1873. The answer is not well drawn, but it is, in effect, an argumentative denial. It denies the ownership of the plaintiff and asserts title in a third person, and hence must be held good as a denial.

The refusal to admit testimony of the witness, Whitlock, was not such an error as will warrant a reversal, if, indeed, there was any error at all. The declarations were in the main mere expressions of opinion as to what would be the result of litigation in the trial court and what it would be on appeal, and it is quite clear that there was very little, if any, probative force in the declarations one way or the other.

There was no error in admitting evidence of the appellant's acquiescence in the occupancy of the strip of land, nor was there any error in admitting evidence of what she offered to receive as compensation for allowing the appellee to construct a pipe line in the strip of land occupied by the railroad company. This evidence was competent as tending

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to show the nature of the injury which the appellant sought to restrain by injunction. It is to be remembered that this is a suit for injunction and not an ordinary action at law, and that injunction is an extraordinary remedy. It is by no means every wrong that will authorize relief by injunction; on the contrary, the elementary rule is, that where there is an adequate remedy at law injunction will not lie. Under this familiar rule it has been held again and again that injunction will not lie to restrain the commission of a trespass. Our statute, indeed, allows the courts to award injunctions only when the threatened act will produce great injury, and the construction placed upon it has been that it does not authorize an injunction where the plaintiff can be fully and readily compensated in damages and there is no fear of a multiplicity of actions. *Clark v. Jeffersonville, etc., R. R. Co.*, 44 Ind. 248; *Indianapolis Rolling Mill Co. v. City of Indianapolis*, 29 Ind. 245. We do not mean to hold that where there is a wrong about to be committed under color of authority that can not be fully compensated in damages, an injunction may not be awarded, but what we do hold is, that evidence tending to show the nature and extent of the threatened injury is competent. In admitting evidence tending to prove a material fact the court does not determine the weight or value of such evidence; it simply determines that the evidence shall be heard. *Pedigo v. Grimes*, 113 Ind. 148; *Colglazier v. Colglazier*, 124 Ind. 196.

The deed executed by a former owner of the land to the predecessor of the Midland Railway Company was properly admitted in evidence. This deed showed that the plaintiff's grantor had conveyed some interest to the predecessor of the Midland Railway Company, and, whether that interest was a fee or a less estate, the deed was competent in connection with other evidence as tending to prove the nature and extent of the injury to the plaintiff. If there was an existing and continuing servitude burdening the land, and the use which the defendant proposed to make of it did not add to

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the burden, the damages of the plaintiff would, at least, be materially lessened. At all events, the evidence was competent for the purpose of showing the character of the injury. It was competent, irrespective of the allegations of the first paragraph of the answer, under the general denial pleaded.

The trial court was not bound by the finding made by the jury, as the case is one of exclusive equity cognizance. It might have adopted the finding of the jury, but it was under no obligation to do so. *Platter v. Board, etc.*, 103 Ind. 360. The record affirmatively shows that the finding was rejected by the court, for it is expressly stated that the court finds that the material "allegations of the answer are true," and that the "court finds for the defendant." There is much evidence tending to prove that the plaintiff sustained no injury from the acts of the defendant, and this evidence, of itself, warranted the finding and judgment that no case was made for an injunction. Under the evidence we can not say that the trial court was not justified in treating the case as one not warranting interference by the extraordinary remedy invoked by the appellant. It may, too, well be that the appellant may maintain an action for damages and yet not be entitled to an injunction. *Kincaid v. Indianapolis Natural Gas Co.*, 124 Ind. 577. We can not without a departure from a long and well settled rule adjudge that the finding is wrong upon the evidence.

Judgment affirmed.

Filed Jan. 30, 1891.

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134	460
127	66
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No. 14,491.

FERGUSON v. SPENCER.

EASEMENT.—License.—Revocation.—The lands of plaintiff and defendant, adjoining owners, were so situated that surface and spring water collected on defendant's land was discharged upon the plaintiff's land. Pursuant to an oral agreement they constructed a drain, each constructing the distance required on his own land. The drain thus constructed was beneficial to the plaintiff's farm.

Held, that the effect of the agreement, when acted upon by the parties, was to create mutual licenses in favor of each in the land of the other, and that the plaintiff having expended money, in reliance upon the agreement, the defendant was liable in damages for digging up the drain on his land and terminating the arrangement.

From the Warren Circuit Court.

J. McCabe and E. F. McCabe, for appellant.

J. W. Sutton and W. L. Rabourn, for appellee.

MITCHELL, J.—The nature of the action, as disclosed by the pleadings, is not very well defined. It may be regarded as a suit to recover damages caused by interrupting the flow of an artificial stream through, or diverting it from, a tile drain through which water was supplied to the plaintiff's animals on her farm.

The merits of the case may be determined upon the following facts returned to the court in a special verdict. In 1884 the plaintiff, Mrs. Spencer, and the appellant, William Ferguson, were adjoining land-owners in Warren county, their farms being separated by a public highway running east and west on the division line. Their farms occupied such a relation that surface and spring water collected on and issuing from the defendant's land was discharged over and through a depression, with more or less defined banks, through a similar depression over and upon the plaintiff's land. In the year above mentioned the parties mutually agreed to construct a covered tile drain, of specified dimensions, to be laid at a given depth, each to construct the dis-

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tance required, on his or her own land. In pursuance of this agreement the plaintiff, commencing at the highway separating her farm from that of the defendant, constructed a drain of the dimensions agreed upon of the length of forty rods, at a cost of over sixty dollars. The defendant at the same time constructed a similar drain on his land, connecting it with that built by the plaintiff at one end, and with an existing tile drain on his land at the other, thereby making a continuous drain over the lands of both, through which water flowed constantly. The drain thus constructed was beneficial to the plaintiff's farm, enhancing its value by affording her more perfect drainage than before, and by furnishing a constant supply of living water for stock on her farm, she having utilized the water by constructing a convenient watering place. In 1887 the defendant refused to continue the arrangement, and dug up some of the tiling on his own land, so as to disrupt the drain and diminish the supply of water, to the damage of the plaintiff.

The question is whether or not, after money had been expended in constructing the drain in reliance upon the agreement, either of the parties, without the consent of the other, could terminate the arrangement without becoming liable for any damage which might result?

The effect of the agreement, when acted upon by the parties, was to create mutual or cross-licenses in favor of each in the land of the other. Each was given a license from the other to make use of the other's land for the purpose of conducting water over it for a purpose supposed beneficial to his own land.

A license is defined to be an authority given to do some act, or a series of acts, on the land of another without possessing an estate therein. *Cook v. Stearns*, 11 Mass. 533 (13 Am. & Eng. Encyc. of Law, 539).

By means of the arrangement entered into the plaintiff obtained a license to connect the covered tile drain which she constructed with a similar drain constructed by the de-

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fendant, thereby affording her the means of draining or conducting water from springs and other sources on the defendant's land for the benefit of her farm. This is found to have been a valuable privilege, to obtain which the plaintiff expended money in reliance upon a mutual agreement entered into with the defendant. It is everywhere settled that a parol license to use the land of another is revocable at the pleasure of the licensor, unless the license has been given upon a valuable consideration, or money has been expended on the faith that it was to be perpetual or continuous. Where a license has been executed by an expenditure of money, or has been given upon a consideration paid, it is either irrevocable altogether, or can not be revoked without remuneration, the reason being that to permit a revocation without placing the other party *in statu quo*, would be fraudulent and unconscionable. *Nowlin v. Whipple*, 120 Ind. 596; *Robinson v. Thraikill*, 110 Ind. 117; *Snowden v. Wilas*, 19 Ind. 10; *Clark v. Glidden*, 60 Vt. 702.

Where a license is coupled with an interest, or the licensee has done acts in pursuance of the license which create an equity in his favor, it can not be revoked. *East Jersey Iron Co. v. Wright*, 32 N. J. Eq. 248.

The present case is closely analogous to *Clark v. Glidden*, *supra*, where it was held that an executed license to lay pipes to conduct water from one farm to another, for the benefit of the owner of the latter, was irrevocable, and the licensor was enjoined, upon terms, from interfering with the water-pipes laid in pursuance of the license. The present case is not distinguishable in principle. It may be conceded that the adjudications upon the subject of the right to revoke parol licenses are not uniform, and that they can not be successfully classified, or arranged, into harmonious groups; but it is the settled law of this State, as it is of many others, that where a license, involving the expenditure of money, has been so far executed that its withdrawal would operate as a fraud upon the person who expended money in reliance upon

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it, no revocation can take place without making compensation to the person injured by the withdrawal. *Simons v. Morehouse*, 88 Ind. 391, and cases cited; *Rogers v. Cox*, 96 Ind. 157. Thus in *Rerrick v. Kern*, 14 Serg. & Rawle, 267 (16 Am. Dec. 497, and note), a leading case on the subject, it is held that an executed license, the execution of which involved the expenditure of money or labor, is regarded in equity as an executed agreement for a valuable consideration, and that it is, therefore, irrevocable, although given merely by parol and relating to the use and occupation of real estate. This doctrine is so thoroughly settled by the decisions of this court that we do not deem it profitable to elaborate the subject further. See 5 *Lawson Rights and Remedies*, section 2675; *Woodbury v. Parshley*, 7 N. H. 237. The rule is, of course, different where nothing but a mere naked license is involved. *Parish v. Kaspare*, 109 Ind. 586.

It may be conceded that a different rule prevails in the State of New York, as well as in some other States. *Cronkhite v. Cronkhite*, 94 N. Y. 323; *Johnson v. Skillman*, 29 Minn. 95 (43 Am. Rep. 192).

Some other questions of minor importance, which do not affect the merits of the case, are suggested. It is sufficient to say we have examined these questions, and find no error which would justify a reversal of the judgment.

Judgment affirmed, with costs.

Filed Nov. 25, 1890; petition for a rehearing overruled Jan. 30, 1891.

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127 70;
138 541
139 295

No. 14,271.

ABBOTT ET AL. v. THE UNION MUTUAL LIFE INSURANCE COMPANY.

TAXES.—*Foreclosure of Tax Lien.*—*Removal of Suit to United States Circuit Court.*—On the removal to the Circuit Court of the United States of a suit to quiet title on a tax deed, or to foreclose a lien, that court has power, in a chancery proceeding, to hear and determine the action, and its finding and decree is final and conclusive, and can not be impeached or questioned in a subsequent action in the Supreme Court of this State.

SAME.—*Sale.*—*Setting Aside of.*—Under a decree of the Circuit Court of the United States foreclosing a tax lien, a sale of the land was made by the special commissioner appointed by the court. On the application of the junior mortgagee the sale was set aside. Thereupon the mortgagee paid into court a certain sum of money, which was accepted by the purchaser at the sale and the complainant in full satisfaction of their claim, and the court entered an order declaring the mortgagee subrogated to all the rights of the complainant in the decree of foreclosure.

Held, that while the payment to the complainant satisfied the decree as to him, it was kept alive as to the mortgagee, and that a subsequent sale might be made.

SAME.—*Subrogation.*—*Prior Mortgagee.*—*Notice.*—The fact that the prior mortgagee had no notice of the application made by the junior mortgagee to be subrogated to the rights of the complainant in the decree, did not render the order of the court void, as the junior mortgagee and the complainant, the only parties interested, were in court.

SAME.—*Foreclosure of Tax Lien.*—*Owner of Land not Made Party.*—*Invalidity of Sale.*—In a suit to quiet title on a tax deed against the mortgagees of the land the owner of the land was not made a party. A decree was rendered declaring the tax deed invalid. The lien for taxes due was declared superior to the liens of the mortgagees and foreclosed, and the land was sold.

Held, that the sale was void as to the owner; that while a mortgagee was estopped by the decree to deny that the lien held by the complainant was superior to the liens held by the mortgagees, he was not estopped to assert that the owner held the title to the land when the decree was rendered.

From the Cass Circuit Court.

F. J. Van Vorhis, W. W. Spencer, E. P. Ferris and J. S. Ferris, for appellants.

D. C. Justice, for appellee.

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COFFEY, J.—This was an action in the court below to quiet title to the land described in the complaint. The complaint proceeds upon the theory that the appellee is the owner in fee of the land in controversy, and seeks to quiet title as against the appellants. The cause was tried by the court, which, at the request of the parties, made a special finding of the facts, and stated its conclusions of law thereon.

The facts, so far as they are necessary to an understanding and proper decision of this cause, are as follows: On the 7th day of June, 1873, Lewis L. Kelley, being the owner of the land involved in this suit, mortgaged the same to David B. Abbott, now deceased, who was the father of the appellants. The mortgage was executed to secure a loan of \$5,000, which is yet unpaid. On the 14th day of the same month Kelley executed to the appellee an additional mortgage on said land to secure a loan of \$6,000, which is unpaid. On the 8th day of February, 1875, the land was sold for the taxes of 1873 and 1874, and bid in by John M. Baker for the sum of \$290.92. Baker assigned the certificate of purchase to William S. Huddleston, who took a deed thereon, and at the June term of the Pulaski Circuit Court for the year 1877, instituted suit to quiet his title, praying that in the event his title should prove to be invalid that the amount due for taxes be ascertained, and that he have a decree foreclosing the same against the land. To this suit the appellee, David B. Abbott, and one Norman D. Knight, were made parties defendant. The cause, on the application of the appellee here, was removed to the Circuit Court of the United States for the District of the State of Indiana, where the same was docketed, and treated as a chancery proceeding.

The appellee and the said David B. Abbott each filed answers in said court, setting up their mortgage liens, in addition to which they averred that the tax sale above named was invalid, because Lewis L. Kelley, against whom the tax was assessed, possessed personal property in the county at the time of such sale out of which the tax could have been

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made. Knight was defaulted. Upon a trial of the cause the court found that the taxes due the complainant amounted to the sum of \$1,224.50, declared the same a lien on the land superior to the liens held by appellee and Abbott, and entered a decree foreclosing the same. On the 9th day of July, 1881, the special commissioner appointed by the court to sell the land under this decree reported that he had sold it to William Spangler for the sum of \$1,355, and that Spangler had complied with the terms of sale.

Upon objections made by the appellee the court refused to approve the sale and set the same aside. Thereupon the appellee paid to the registry of the court the sum of \$1,389.50, which the complainant and the said Spangler drew out and accepted in full satisfaction of their claims, and the court entered an order declaring the appellee subrogated to all the rights of the complainant in the decree of foreclosure. The land was again exposed to sale, bid in by the appellee, the sale reported to the court and approved, and a deed ordered made, and approved. The appellee took possession of the land pursuant to its purchase and has ever since held the same. It further appears that Kelley died insolvent, but at what date he died does not appear, nor does it appear that he ever parted with his title to the land in dispute. He was not made a party to the suit to quiet title on the tax deed, nor were his heirs, if he had any, made parties. It does not appear what claim, if any, Knight had upon or against the land.

Upon these facts the court found, as a conclusion of law, that the appellee was the owner in fee of the land in controversy, and entered a decree quieting its title.

Many questions of a purely technical character are presented and argued by both parties, but as the cause would not be reversed for any of these technical errors, we need not encumber this opinion with their discussion. The questions which go to the merits of the controversy are:

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First. Was the decree of the Circuit Court of the United State valid and binding on the parties thereto ; and,

Second. Did the appellee acquire title to the land under a sale made pursuant to that decree.

It is contended by the appellant that the remedy provided by our statute for the holders of invalid tax deeds is special, and could not be enforced by the Circuit Court of the United States in a proceeding in chancery.

We are not inclined to adopt this contention as being sound. Proceedings to foreclose mortgages and other liens are essentially proceedings in chancery, and the Circuit Court of the United States, in a case where it acquires jurisdiction, will enforce the rights conferred by the statutes of a State. Where the case is on the equity side of the court, in the enforcement of such rights, the United States courts are only applying an old remedy to a new equity. *Clark v. Smith*, 13 Peters, 195 ; *Holland v. Challen*, 110 U. S. 15 ; *Fenn v. Holme*, 21 How. 481 ; *Bennett v. Butterworth*, 11 How. 669 ; *Parish v. Ellis*, 16 Peters, 451 ; *Hooper v. Scheimer*, 23 How. 235 ; *Thompson v. Railroad Co.*, 6 Wall. 134.

In our opinion the Circuit Court of the United States had power to hear and determine the action brought by Huddleston to quiet title on his tax deed, and that the finding and decree of that court, as to the parties before it, is final and conclusive and can not be impeached or questioned in this case.

It is further contended by the appellants that the sale made by the special commissioner to Spangler satisfied the decree, and that no subsequent sale could thereafter be made. We do not think this position is tenable. Under the practice in the Circuit Court of the United States, the sales by its commissioners are subject to the approval of the court. In this case the court refused to approve the sale and set the same aside. When the sale was set aside by the court the case occupied the same position as before the sale was made.

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The decree remained unsatisfied. It is true that the payment of the amount due to Huddleston by the appellee in this case, satisfied the decree as to Huddleston, but equity kept it alive as to the appellee, who had paid it to protect its lien on the land. Sheldon Sub., section 14; *Spray v. Rodman*, 43 Ind. 225.

Again it is objected that Abbott had no notice of the application made by the appellee to be subrogated to the rights of Huddleston in the decree foreclosing the tax lien, and it is contended that the order of the court is, for that reason, void.

Assuming, without deciding, that Abbott was not in court, and that he was not bound to take notice of every step taken between the date of the decree and the final sale of the property, we are still constrained to hold that the objection urged is unavailing. This order was one in which Abbott had no interest. It was wholly immaterial to him whether the lien was held by Huddleston or by the appellee. His rights were the same against either. So it was immaterial to him whether Huddleston assigned the decree direct to the appellee, or whether the appellee paid the claim and took an order subrogating it to the rights of Huddleston. Huddleston and the appellee were in court at the time the order of subrogation was made, and they being the only parties interested therein the order is valid.

The question as to whether the appellee, by its purchase under the decree of the Circuit Court of the United States, acquired title to the land in dispute still remains for consideration.

It is not claimed that either Abbott or the appellee owned, or made any claim of ownership, to the land at the time the suit between them and Huddleston was pending. The right of each consisted in a mortgage lien created by Kelley, the owner of the fee; nor is it claimed that either Kelley or his legal heirs were made parties to that suit. Had it been determined by the court that Huddleston's tax deed was valid

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both Abbott and the appellee would have been bound by such determination, just as they are bound by the determination that Huddleston's lien is superior to the lien held by either of them. Had Huddleston succeeded in quieting his title the liens held by Abbott and the appellee would have been divested; but as they defeated the title claimed by Huddleston, the only thing settled between them was that the tax lien was superior to the other liens involved. It seems to be quite well settled that a sale on a decree of foreclosure where the owner of the property upon which the lien rests is not made a party, is void. *Curtis v. Gooding*, 99 Ind. 45; *Pauley v. Cauthorn*, 101 Ind. 91; *Shirk v. Andrews*, 92 Ind. 509; *Searle v. Whipperman*, 79 Ind. 424; *Daugherty v. Deardorf*, 107 Ind. 527; *Petry v. Ambrosher*, 100 Ind. 510; *Griffin v. Hodshire*, 119 Ind. 235.

As Kelley was the owner of the land in dispute at the time he executed Abbott's mortgage, the presumption is that he still owned it at the time of his death, and that it descended to his legal heirs. *Rush v. Megee*, 36 Ind. 69; *Adams v. Slatte*, 87 Ind. 573.

As neither Kelley nor his heirs were made parties to the suit instituted by Huddleston, resulting in the decree upon which the land was sold, the sale as to them is void, and vested no title in the appellee. Without the owner before the court no valid decree for the sale of the land could be entered. Nor do we think the appellants are estopped by the decree in the proceedings to quiet title on the tax deed from asserting that Kelley owned the land at that time. They are estopped from denying that the lien held by Huddleston is superior to the lien held by them, and nothing more.

If the heirs of Kelley should, by proper legal proceedings, have the sale made on that decree declared void, we think the parties to that suit would stand precisely where they stood before the sale was made. That they would be enti-

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tled to such a decree, under the facts now before us, can not be doubted.

The fact that no such decree has been made does not change the rights of the parties. If the sale is void, the rights of the parties are the same as if it had not been made.

The lien of Abbott's mortgage attached to the land, in the hands of Kelley, and there it must remain until Kelley's title is divested on some lien superior to the mortgage. This can not be done in a proceeding to which neither Kelley nor his heirs are made parties.

But it is contended that Knight held the title formerly owned by Kelley, and that we must presume such to be the fact.

We do not think we are authorized to indulge such a presumption. Of course, if Knight was the owner of Kelley's title at the time the suit to foreclose the tax lien was pending, a very different question from the one we are now considering would be presented. But, as we have seen, the presumption is that the title was in Kelley or his heirs.

The special finding is defective in not finding the relation in which Knight stood to the suit instituted by Huddleston to quiet his title. Did we know his relation to that suit we would be able to direct the proper decree by the circuit court, but in the absence of such knowledge we are unable to do so without the risk of doing an injustice.

In our opinion the circuit court erred in its conclusion on the facts found that the appellee is the owner of the land in controversy.

Judgment reversed, with directions to the circuit court to grant a new trial.

Filed Dec. 9, 1890.

Jacobs v. The State.

No. 15,869.

JACOBS v. THE STATE.

FINDING.—*Special and General.*—Where the court is not asked to make a special finding, a finding made by it will be treated as a general finding.

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127	77
159	480
159	483
127	77
166	138

PAYMENT.—*Plea of.*—*Evidence.*—For evidence held sufficient to support a plea of payment by the State for services rendered by plaintiff's firm of attorneys, see opinion.

From the Marion Superior Court.

C. P. Jacobs, for appellant.

A. G. Smith, Attorney General, and *J. H. Gillett*, for the State.

BERKSHIRE, J.—This is an action brought against the appellee by the appellant to recover certain sums of money alleged to be due on account of services rendered the appellee by the firm of Barbour and Jacobs, attorneys at law.

The cause was put at issue and tried by the court and a finding made for the appellee, and, over a motion for a new trial, judgment was rendered for the appellee.

The only question which the assignment of error presents for our consideration is the ruling of the court in overruling the motion for a new trial.

The only reasons assigned in the motion for a new trial are that the verdict is not sustained by sufficient evidence, and is contrary to law.

The only question discussed in the briefs of counsel is the sufficiency of the evidence to sustain the finding.

The court states, in a bill of exceptions, that it rests its finding upon the following ground: "The court was unable to make any allowance to the plaintiff as against the defendant in this cause, for the reason that it appeared the Legislature, in 1873, made an appropriation to Barbour and Jacobs for services in the causes whereon the claim arose, and the presumption would be that such allowance was in full for all services in the said causes, whether theretofore rendered or thereafter to be rendered, and that the evidence in the case was not sufficient to rebut this presumption."

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The court was not asked to make a special finding, and hence the finding made by the court must be regarded and treated as a general finding. *Northcutt v. Buckles*, 60 Ind. 577; *Zeller v. City of Crawfordsville*, 90 Ind. 262; *Prilliman v. Mendenhall*, 120 Ind. 279.

The reasoning of the court which led to the conclusion to which it arrived is wholly immaterial, except by way of argument, coming as it does from a court of high standing.

The ground upon which the court placed its finding can not control its legal effect, nor give to it the character of a special finding; hence, as it is a general, and not a special finding, the question for us to determine is, whether or not, under the issues upon which the cause was tried, there is sufficient evidence to support the finding independent of any evidence that may have been introduced tending to support an opposite view. Among other answers pleaded there was a plea of payment.

It appears in evidence that the Legislature, in the year 1873, made an appropriation for the benefit of the appellant's firm on account of their services in looking after and attending to the matters in litigation to which the services sued for relate.

In view of the circumstances under which the appropriation was made, and the inability of the appellant to explain with any exactness just what it was intended to cover, and the further significant fact that no demand was made for payment after the year 1875, until the commencement of this suit in the year 1889, coupled with the further fact that the senior member of the appellant's firm died in the year 1880, we are not prepared to say that the trial court might not infer payment. Indeed, we think the evidence tended strongly to support the plea of payment.

We find no error in the record.

Judgment affirmed, with costs.

Filed Jan. 30, 1891.

Cicero School Township v. The Chicago National Bank.

No. 15,849.

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159	643

CICERO SCHOOL TOWNSHIP v. THE CHICAGO NATIONAL BANK.

SUMMONS.—Against Township Trustee.—A summons, reading, "You are hereby commanded to summons trustee Cicero school township," etc., sufficiently indicates that the action is against the township, and not against the trustee personally, and the township is bound to take notice of the pendency of the action. *Vogel v. Brown Township*, 112 Ind. 299, distinguished.

From the Tipton Circuit Court.

W. R. Oglebay and C. N. Pollard, for appellant.
J. N. Waugh and J. P. Kemp, for appellee.

McBRIDE, J.—The only error assigned in this case is that the court erred in sustaining a demurrer to a paragraph of plaintiff's complaint. Appellant brought suit to set aside a judgment recovered at a previous term of court, on the ground that the court rendering it had never acquired jurisdiction of the person of the defendant, and that by reason thereof the judgment was void. The only question presented is as to the sufficiency of the summons, which is as follows:

“THE STATE OF INDIANA, Tipton County, ss:

“The State of Indiana, to the sheriff of Tipton county, greeting: You are hereby commanded to summons trustee Cicero school township, Tipton county, Indiana, to appear in the Tipton Circuit Court, before the judge thereof, on the 25th day of February, 1888, the same being the eighteenth judicial day of the February term of said court, which term will commence at the court-house in Tipton on the first Monday in February, 1888, then and there to answer the complaint of the Chicago National Bank, and of this writ make due return.

“Witness, Henry H. Thomas, clerk of said court, and the seal thereof hereunto affixed, at Tipton, this 15th day of February, 1888. HENRY H. THOMAS, Clerk.”

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No question is made as to the fact of the service of this summons. That it was issued in time, and was, in fact, served on the trustee of Cicero school township more than ten days before the rendition of the judgment, is not disputed. There was no appearance, in that case, for the township, and the judgment was on default. Counsel for appellant insist that this summons was not against the township, but was a summons to its trustee, or agent, only, and that the township was not bound to take notice of it, and cite *Vogel v. Brown Township*, 112 Ind. 299, as authority. In that case summons was issued against "Valentine Strange, trustee of Brown civil township, Martin county, Indiana," and the court says: "This can not be regarded as a writ against the township. Strange, although the trustee, was not the township. At most he was its special agent, with naked statutory powers."

This is unquestionably true. The summons was plainly against Valentine Strange. The addition of the words "trustee," etc., is merely *descriptio personæ*. *Hobbs v. Cowden*, 20 Ind. 310. And although summons in that case was served upon the trustee it was held that there was no legal notice to the corporation, for the reason that the summons did not purport to be directed against it, but did purport to be directed against the trustee personally. Nor would the fact that the trustee had personal knowledge of the action, and had reason to believe that while the summons was against him personally, it was, in fact, intended to be against the township, affect the question. As trustee of the township he was charged, and through him the township was charged, only with notice of such facts as were disclosed upon the face of the summons, and such inferences as might be fairly drawn therefrom. We can not, however, agree with appellant, that the summons in this case is open to this objection. Section 317, R. S. 1881, provides that "No summons, or the service thereof, shall be set aside, or be adjudged insufficient, where there is sufficient substance about either to inform the party on whom it may be served, that there is an

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action instituted against him in court, the name of the plaintiff and the court, and the time when he is required to appear."

In the summons in this case there was certainly sufficient to inform the trustee that an action had been instituted against him in court, not personally, but in his representative character. This could only mean that plaintiff in that action was asserting a claim against the township of which he was trustee.

There was nothing to indicate that plaintiff was asserting any claim against him personally, any more than there would have been if the word "trustee" had been omitted.

The summons clearly indicates that the action is against the officer, and not against the individual, and against the officer as the representative of the school township, and being the proper person upon whom process against that townsnip should be served, the township was thereby bound to take notice of the pendency of the action. In our opinion the demurrer was correctly sustained.

Judgment affirmed, with costs.

Filed Jan. 29, 1891.

No. 14,737.

LITTEN, ADMINISTRATOR, v. WRIGHT SCHOOL TOWNSHIP.

TOWNSHIP TRUSTEE.—School Supplies.—Note.—When Township Bound.—A note, or other obligation, executed by the township trustee for school supplies purchased on credit does not bind the school corporation; it is bound only where the school supplies were actually delivered to the school township.

SAME.—Value of Supplies.—Evidence.—The notes or certificates issued by a township trustee do not preclude the school township from proving the actual or true value of the property purchased by the trustee. Evidence of the value of the property alleged to have been sold to the school township is properly admissible.

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144	434
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EVIDENCE.—*General Objections.*—General objections to evidence are unavailing, and only such objections as are specifically stated will be noticed on appeal.

SAME.—*Witness's Interest.*—An objection that certain letters given in evidence were written after the notes in suit had been assigned, is unavailing where the letters are competent as tending to show the interest of some of the witnesses in the cause.

From the Greene Circuit Court.

A. G. Cavins, E. H. C. Cavins and W. L. Cavins, for appellant.

J. D. Alexander and H. W. Letsinger, for appellee.

ELLIOTT, J.—Our decisions affirm that to entitle a plaintiff to recover for personal property sold to a township trustee for school purposes, it must be shown that the property was delivered to the school township or its officers. *Honey Creek School Tp. v. Barnes*, 119 Ind. 213; *Bloomington School Tp. v. National, etc., Co.*, 107 Ind. 43; *State, ex rel., v. Hawes*, 112 Ind. 323; *Boyd v. Mill Creek School Tp.*, 114 Ind. 210; *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464. A note, or other obligation, executed by the trustee does not bind the school corporation, for it is only bound where the school supplies are actually furnished. *Union School Tp. v. First Nat'l Bank, supra*; *Grimsley v. State, ex rel.*, 116 Ind. 130.

The notes or certificates issued by a township trustee do not, under the law declared in the cases referred to, preclude the school township from proving the actual or true value of the property purchased by the trustee. If, in fact, the property is valueless nothing can be recovered. The rule which prevails in ordinary cases where parties fix the value of property by the exercise of their own judgment, does not apply to the purchase of supplies, on credit, for school corporations, for no more than the reasonable value of the property can, in any event, be recovered. *Boyd v. Mill Creek School Tp.*, *supra*. The law intends that where property is sold, on credit, to school corporations, they

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shall be only held for the fair and reasonable value of the property received. Parties who deal with school officers are bound to know the limitations placed upon them by law. It was, therefore, proper in this case to admit evidence of the value of the property which the plaintiff alleged had been sold to the school township.

General objections to evidence are unavailing, and only such objections as are specifically stated will be noticed on appeal. *Ohio, etc., R. W. Co. v. Walker*, 113 Ind. 196, and cases cited; *Metzger v. Franklin Bank*, 119 Ind. 359. The only specific objection made to certain letters that were given in evidence is that they were written after the notes had been assigned, and this objection is unavailing, for the reason that the letters were competent as tending to show the interest of some of the witnesses in the cause.

There is a conflict of evidence, but we think the very decided preponderance of the evidence upon the question whether the property was delivered to the school township is in favor of the finding of the jury. This was the pivotal question in the case, and its decision against the appellant precluded a recovery. *Boyd v. Mill Creek School Tp.*, *supra*.

Judgment affirmed.

Filed Jan. 29, 1891.

No. 14,723.

ROBERTS, BY NEXT FRIEND, v. ABBOTT ET AL.

WILL.—*Contest of.—Purchasers from Devisee.—Parties.*—In an action to set aside a will admitted to probate, and to establish and probate a lost will, purchasers of land from the devisee under the probated will are proper parties defendant.

SAME.—*Prosecution of Claim against Estate.—Estoppel.*—The fact that the plaintiff, with knowledge of the execution of the will, which disinherited her, prosecuted a claim to final judgment against the administratrix with the will annexed, for services rendered to the testator, and for property converted by him, did not estop the plaintiff to deny the validity of the will.

127	83
134	479
127	83
149	67
127	83
146	623
127	83
148	32
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154	361
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1167	677

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SAME.—*Pleading.*—*Answer Alleging Final Settlement.*—To a suit to contest a will, an answer alleging a final settlement and an order of the court discharging the administratrix with the will annexed, presents no defence where the estate consists of both personal and real property.

SAME.—*Pleading.*—*Striking out Allegations.*—In a suit to contest a will allegations in the complaint relating to an agreement by the terms of which it is alleged the testator agreed with his brother to make a will bequeathing all his property to the plaintiff may properly be stricken out.

PLEADING.—*Partial Defence.*—*Demurrer.*—A pleading which purports to answer the whole complaint, and the matters therein pleaded, amounting to a partial defence only, is bad on demurrer.

From the Montgomery Circuit Court.

W. B. Herod and W. W. Thornton, for appellant.

J. F. Harney, J. Wright and J. M. Seller, for appellees.

COFFEY, J.—This was an action by the appellant against the appellees to contest the will of John Abbott, deceased. The complaint in the cause consists of two paragraphs. Each paragraph alleges that there was probated in the clerk's office of the Montgomery Circuit Court, on the 14th day of December, 1886, what purports to be the last will and testament of John Abbott, deceased; that the clerk of said court granted to the appellee, Nancy Abbott, who is the widow of John Abbott, letters of administration upon said estate, with said will annexed; that she had fully administered said estate and had filed her final settlement which had been approved; that by the terms of said pretended will the said Nancy was entitled to all the property of the deceased, both real and personal; that long prior to the date of said pretended will the said John Abbott duly executed another will, by the terms of which he bequeathed to the appellant all of his property, both real and personal, subject to a life-estate of the appellee, Nancy Abbott; that said last named will has been lost or destroyed, so that a copy thereof can not be filed with the complaint.

It is alleged that at the time the pretended will admitted to probate was signed by John Abbott, he was a person of

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unsound mind, and that the same was procured to be executed by the fraud and undue influence of the appellee, Nancy Abbott. It appears by the complaint that John Abbott died the owner of both real and personal property.

It is further alleged that the appellees, John Lough, Rufus Lough, William Yelton and Nancy F. White have purchased from the said Nancy Abbott certain described portions of the real estate of which John Abbott died the owner, and it is alleged in the second paragraph of the complaint that they each had notice of the will which the appellant seeks to establish and probate at the time of their respective purchases. The prayer is that the pretended will admitted to probate be set aside and declared void, and that the lost will be established and admitted to probate.

To this complaint Nancy Abbott filed an answer in two paragraphs. The first paragraph of the answers avers, substantially, that after the appellant learned of the execution of the will which she seeks to contest in this suit, she began her action in the Montgomery Circuit Court against John Abbott, the testator, to recover the value of certain services rendered by her to the testator, and the value of certain personal property belonging to her and theretofore converted to his own use by said John Abbott; that pending said suit John Abbott died, and that the appellee, Nancy Abbott, was duly appointed and qualified as administratrix of his estate, with said will annexed; that said will was duly probated on the 14th day of December, 1886; that after said will was probated, and after the appellee had qualified as such administratrix, she was, on motion of the appellant, substituted as defendant in said action, with full knowledge on the part of the appellant of all the facts alleged in the complaint, and with full knowledge of all said facts, she prosecuted her said action to final judgment, recovering therein the sum of five hundred dollars and her costs of suit; all of which the appellee paid her out of the funds belonging to said estate, which she yet retains.

Roberts, by Next Friend, *v.* Abbott *et al.*

The second paragraph of the answer sets up, by way of estoppel, the final order of the court discharging the appellee, Nancy Abbott, administratrix.

The court sustained a demurrer to the second paragraph of the above answer and overruled it to the first.

The appellant, electing to stand by her demurrer to the first paragraph of the answer, the appellee Nancy Abbott had judgment for costs.

John Lough, Rufus P. Lough, William Yelton and Nancy L. White filed a demurrer to the complaint upon the ground that it did not state facts sufficient to constitute a cause of action as to them, which was sustained by the court, and they had judgment for costs.

On motion of the appellee Nancy Abbott, certain parts of the complaint and certain interrogatories propounded to her by the appellant were struck out, and the ruling saved by a proper bill of exceptions.

The several rulings above stated against the appellant are presented by assignment of error, and the question arising on the action of the court in sustaining the demurrer to the second paragraph of the answer of the appellee Nancy Abbott, is presented by the assignment of cross-error.

The first question arising on the record relates to the action of the court in sustaining the demurrer of Lough and others to the complaint.

The right of the appellant to prove and have probated the will executed by John Abbott in her favor, and to have the will in favor of Nancy Abbott set aside and revoked, if the facts alleged in the complaint are true, is fully secured to her by the provisions of section 2607, R. S. 1881.

Indeed, it is not seriously contended in this court that the complaint does not contain a cause of action against Nancy Abbott. The contention here is that the other appellees were improperly joined with her in this suit. But the demurrer was not on the ground of misjoinder of causes of

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action, but was, we have seen, upon the ground that the complaint did not state facts sufficient to constitute a cause of action against them.

As the question whether it was necessary to allege notice on the part of the purchasers of the real estate of John Abbott has not been argued in this court, we have not considered it, but such notice is alleged in the second paragraph of the complaint.

That paragraph, in our opinion, states a cause of action against the purchasers of the real estate from Nancy Abbott, who makes her title through the probated will of John Abbott.

If that will was invalid Nancy Abbott's title under it must fail.

The purchasers from her have an interest in maintaining the validity of that will, as their title, if they had notice of the will in favor of the appellant, must fail if the will fails. That will is the foundation of the title held by them by conveyance from Nancy Abbott, and when the foundation is destroyed their title must fall with it, unless something has occurred to save it. We think these purchasers were proper parties to the action. The law abhors a multiplicity of suits, and certainly the appellant should not be required to litigate the matters set up in her complaint twice if it can be avoided. Should she prosecute her action against Nancy Abbott alone, the purchasers of real estate from her would not be bound by the result, and she would, in order to make her suit available, be compelled to litigate the questions again with the purchasers.

The case of *Gaines v. Chew*, 2 Howard, 619, is in point. In that case Mrs. Gaines sought to establish a lost will in her favor, and to her bill in equity for that purpose she made the purchasers under another will parties defendant. It was held by the Supreme Court of the United States that such purchasers were proper parties.

In our opinion the court erred in sustaining the demurrer

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of John Lough, Rufus P. Lough, William Yelton and Nancy F. White to the complaint in this case.

The next question arising upon the record, in the natural order, relates to the action of the court in overruling a demurrer to the first paragraph of the answer filed by the appellee Nancy Abbott.

The appellee has cited us to no authority in support of this ruling. The answer admits that John Abbott executed a valid will, by the terms of which he bequeathed to the appellant all his property, both real and personal; that at the time he executed the will under which the appellee Nancy Abbott claims her estate, he was a person of unsound mind, and incapable of executing a will, and that what purports to be his last will was procured by the fraud and undue influence of the appellee. The question is here presented as to whether the appellant is estopped from asserting these facts, by reason of having prosecuted a claim against John Abbott's estate, for labor and personal property, with knowledge of the existence of this invalid will, by the terms of which she was deprived of any interest in the estate.

In a proceeding like this, to contest the will, it can not be successfully maintained that she is estopped by the probate thereof, for she was not a party to any proceeding for that purpose.

She is not estopped by reason of having received anything under the terms of the will, for it gives her nothing. The money paid her by the administratrix was paid upon a claim due her for services rendered John Abbott, and for personal property belonging to her and converted by him.

Did the mere fact that she prosecuted her claim to final judgment against Nancy Abbott, as the administratrix with the will annexed, to final judgment, and received the money thereon, estop her from denying the validity of the will under which Mrs. Abbott claims the estate?

In the case of *Gaither v. Gaither*, 23 Ga. 521, Mrs. Gaither was appointed executrix of the will of her husband.

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She probated the will and qualified and entered upon the execution of her trust. She subsequently sought to set the will aside for want of testamentary capacity in the testator at the time of its execution, and on account of undue influence. It was held that she was not estopped from denying the validity of the will by reason of having the same probated, nor by reason of having qualified as executrix.

Ordinarily, to constitute an estoppel by conduct there must be :

1. A representation or concealment of material facts.
2. The representation must have been made with knowledge of the facts.
3. The party to whom it was made must have been ignorant of the truth of the matter.
4. It must have been made with the intention that the other party should act upon it.
5. The other party must have been induced thereby to act.

Hosford v. Johnson, 74 Ind. 479.

In the prosecution of her claim against the estate of John Abbott, the appellant did nothing more than exercise a legal right. Such right was the same under the will she seeks to establish as it was under the will she seeks to set aside. It was not dependent on either will, but was a purely legal right, which she might exercise whether John Abbott died testate or intestate. There is no claim that any one changed his or her position, or did anything that would not have been done, by reason of the prosecution of her claim, save the fact that the claim was paid in obedience to the judgment and order of the court.

In our opinion the appellant is not estopped from contesting the validity of the will under which Nancy Abbott claims the estate of her late husband, by reason of having prosecuted a claim against said estate, and the court, for that reason, erred in overruling her demurrer to the first paragraph of the answer of the appellee Nancy Abbott.

Roberts, by Next Friend, *v. Abbott et al.*

We do not think the court erred in sustaining a demurrer to the second paragraph of the answer of Nancy Abbott.

It is unnecessary that we should inquire into the effect of the final settlement therein set out, upon the personal estate of John Abbott, for the answer is pleaded as a defence to the whole action. It could not operate as a defence to the claim made to the real estate, for the administratrix had no control, as such administratrix, over the land. No distribution of land could be made by her, and for these reasons the order effecting a distribution of the personal estate could, by no possibility, affect the title to the land. A pleading which purports to answer the whole complaint, and the matters therein pleaded, amounting to a partial defence only, is bad on demurrer. *Moffitt v. Roche*, 76 Ind. 75; *Farman v. Chamberlain*, 74 Ind. 82; *Robbins v. Magee*, 76 Ind. 381; *Harmony School Tp. v. Moore*, 80 Ind. 276.

The allegations in the complaint struck out by the court relate to an agreement, by the terms of which it is alleged John Abbott agreed with his brother to make a will, by the terms of which he would bequeath all his property to the appellant.

We do not think the court erred in striking out these allegations. We are not unmindful of the doctrine announced in the case of *Lamb v. Lamb*, 105 Ind. 456, to the effect that it is permissible to prove, as affecting mental capacity, that the testator was under a moral obligation to make a will of a particular kind, but the matters here sought to be established opened the door to innumerable collateral questions which could throw no light upon the main issues in the cause. The interrogatories struck out related to the same matter.

Judgment reversed, with directions to overrule the demurrer of John Lough, Rufus P. Lough, William Yelton and Nancy F. White to the complaint, and to sustain the demurrer of the appellant to the first paragraph of the answer of Nancy Abbott.

Filed Jan. 29, 1891.

Harry *et al.* v. Harry.

No. 14,678.

HARRY ET AL. v. HARRY.

LANDLORD AND TENANT.—*Lease to Co-Tenant.—Holding Over.—Liability for Rent.*—Where the duration of the tenancy is definitely fixed by the terms of the agreement under which the tenant goes into possession of the premises which he is to occupy, and he continues to occupy after the close of the term without a new contract, the rights of the parties are controlled by the terms and conditions of the contract under which the entry was made. The same rule applies where the landlord and tenant hold title as tenants in common as in other cases.

SAME.—*Tenants in Common — Improvements Made and Services Rendered in Absence of Contract.*—One tenant in common can not charge his co-tenant for improvements voluntarily made upon the joint estate, nor for voluntary services in managing it.

SAME.—*Improvements and Labor.*—The tenant can not charge his landlord for improvements made upon the leased property, or for labor performed on the premises, in the absence of an express contract.

SAME.—*Counter-Claim.—Pleading.*—In an action for rent an answer in the nature of a counter-claim, alleging that the plaintiff is indebted to the defendants for labor performed in paying taxes, without alleging that the defendant furnished the money with which they were paid, is bad.

From the Henry Circuit Court.

J. M. Brown and W. A. Brown, for appellants.

BERKSHIRE, J.—The appellee was the plaintiff below. He alleged in his complaint that he and the appellants were tenants in common of certain real estate, the undivided interest of the appellee being equal to the one-eighth of said real estate; that on the 17th day of August, 1885, he leased to the appellants, for the term of one year, his interest in said real estate for such rent as the same was reasonably worth; that at the close of said year the appellants continued in possession of said real estate and held and occupied the same during the second year; that the reasonable rental value of said premises for the first year was fifty dollars, and for the second year fifty dollars; that the rent for the second year is due and unpaid.

The appellants demurred to the complaint, and their de-

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murder being overruled they reserved an exception. They then filed an answer in two paragraphs, the first of which was a general denial. The second paragraph is in the nature of a counter-claim. It alleges that the appellee is indebted to the appellants in the sum of fifty dollars for work and labor done and performed on the premises, consisting of fencing, ditching, grading, clearing, building bridges, paying taxes and manuring said real estate, whereby the value of said real estate has been greatly increased.

To this paragraph of answer the appellee submitted a demurrer, which was by the court sustained, and the appellants saved an exception.

The cause was thereafter submitted to the court for trial, the result of which was a finding and judgment for the appellee in the sum of thirty-five dollars.

The assignment of error brings in question the correctness of the court's rulings in overruling the demurrer to the complaint, and in sustaining the demurrer to the answer.

The first year's occupancy of the premises was under a contract which was valid and binding upon all the parties; counsel for the appellant make no contention to the contrary. This being true, the contract created the relation of landlord and tenant. See *Hamby v. Wall*, 48 Ark. 135 (3 Am. St. Rep. 218).

It is well settled that where the duration of the tenancy is definitely fixed by the terms of the agreement under which the tenant goes into possession of the premises which he is to occupy, and he continues to occupy after the close of the term without a new contract, the rights of the parties are controlled by the terms and conditions of the contract under which the entry was made.

The tenant is still a tenant by contract. *Tinder v. Davis*, 88 Ind. 99; *Coomler v. Hefner*, 86 Ind. 108; *Bollenbacker v. Fritts*, 98 Ind. 50; *New York, etc., R. W. Co. v. Randall*, 102 Ind. 453.

We have been unable to find any exception to this rule in

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cases where the landlord and tenant held title to the real estate as tenants in common, and counsel for the appellants have referred us to none. Upon principle we think the rule should be the same as in other cases.

The appellee in this case had a right to rely upon the contract made for the first year's occupancy, as having been renewed or extended to the second year, as the appellants continued to occupy the premises, and manifested no inclination to have a different arrangement.

We are referred to the case of *Crane v. Waggoner*, 27 Ind. 52, as indicating the rule which prevails as between tenants in common. But the rule there laid down only applies in the absence of a contract, and where there has been no denial by the tenant in possession of the right of his co-tenant to jointly occupy the premises with him.

The rule as declared in that case is a well settled rule in this State, and can not be disregarded. *Humphries v. Davis*, 100 Ind. 369; *Carver v. Fennimore*, 116 Ind. 236. But we do not regard this rule as so manifestly equitable that it is entitled to such liberal construction as to create an exception to the rule which prevails between landlord and tenant referred to above in the class of cases to which the one under consideration belongs.

The last named rule is a just and equitable one, while the other is tempered with no equitable principle, but is purely a technical rule.

We do not think the court erred in overruling the demurrer to the complaint. And notwithstanding the liberality in practice and pleading that prevails before justices of the peace, the second paragraph of the answer filed by the appellants is bad.

It is equivocal in its averments, and hence it is difficult to determine whether the claim therein put forward is for work and labor performed, or for improvements made upon the joint estate. But whatever may be the theory of the answer, it is bad.

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It is well settled law in this State that one tenant in common can not charge his co-tenant for improvements voluntarily made upon the joint estate. *Elrod v. Keller*, 89 Ind. 382; *Carver v. Fennimore*, 116 Ind. 236 (242); *Lane v. Taylor*, 40 Ind. 495. See, also, *Annely v. De Saussure*, 26 S. C. 497 (4 Am. St. Rep. 725).

We are not aware of any case where this court has passed directly upon the question as to the right of one co-tenant to recover from another for services rendered in looking to the welfare and in the management of the joint estate in the absence of an express agreement, but the principle involved is covered by the cases *supra*. And there is abundant authority elsewhere to the effect that no such liability exists. *Redfield v. Gleason*, 61 Vt. 220 (15 Am. St. Rep. 889); *Hamilton v. Conine*, 28 Md. 635 (92 Am. Dec. 724).

Besides, as the relation of landlord and tenant existed between the parties, the right of the appellants to compensation, either for improvements or for work and labor performed, must be controlled by the rule which governs as between landlord and tenant. That the tenant can not charge his landlord for improvements made upon the leased property, except by express contract, is too well settled to demand a citation of authority, but see our cases: *Purcell v. English*, 86 Ind. 34; *Lucas v. Coulter*, 104 Ind. 81; *Hopkins v. Railiff*, 115 Ind. 213. And it is equally well settled that the tenant can not charge his landlord for work and labor performed in and about the leasehold estate, or in its management, where there is no agreement that he shall be compensated therefor.

But it is insisted that the appellee is chargeable with his proportion of the taxes, to which the joint estate was subject, paid by the appellants.

Conceding the correctness of this insistence, it lends no support to the answer. There is no direct averment that the appellants made any payments on account of taxes for which the real estate was liable; if it can be said that there

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is any indication in the answer that such payment was made it is by mere indirection. The charge is for work and labor in paying taxes, and not for taxes paid. What amount was paid, or who furnished the money with which to make the payment, does not appear. For all that appears in the answer, so far as any payment may have been made, the appellee may have furnished the money.

The court committed no error in sustaining the demurrer to the answer.

There is no error in the record.

Judgment affirmed, with costs.

Filed Jan. 29, 1891.

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128 94

No. 14,742.

FAIRPLAY SCHOOL TOWNSHIP *v.* O'NEAL.

SCHOOLS.—Contract.—Employment of Teacher.—A verbal contract entered into March 31st, 1888, by a teacher with the school trustee, wherein the teacher undertook to teach the school for the term to be held in the school year 1888, for which the trustee promised to pay her "good wages," is not such a contract as will bind the school township and make it liable for a breach.

From the Greene Circuit Court.

A. G. Cavins, E. H. C. Cavins and W. L. Cavins, for appellant.

W. W. Moffett and C. E. Davis, for appellee.

ELLIOTT, J.—The complaint of the appellee alleges that she was duly licensed to teach school, and that her license was in force on the 31st day of March, 1888; that she entered into a verbal contract with the school trustee on that day, wherein she undertook to teach school for the term to be held in the school year 1888; that the school trustee promised in said oral contract to pay her "good wages;"

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that she has been ready and willing to teach, but the trustee refused to permit her to do so.

The question presented is whether there was such a contract as bound the school township and made it liable for damages for a breach. Our opinion is that there was no such contract. The trustee is an officer clothed with statutory power, and all who deal with him are bound to take notice of the nature and extent of his authority. *Union School Tp. v. First Nat'l Bank*, 102 Ind. 464; *Litten v. Wright School Tp.*, *ante*, p. 81. The authority of the trustee respecting schools is vested in him for a public purpose, in which all the citizens of the township have an interest, and upon many phases of which they have a right to be heard by petition or remonstrance. This is especially so with regard to the employment of teachers. It is necessary, for the information of the citizens, that contracts made with teachers should be certain and definite in their terms, otherwise the citizens can not guard their interests nor observe the conduct of their officer. It is necessary that the contract should be definite and certain in order that when the time comes for the teacher to enter upon duty there may be no misunderstanding as to what his rights are. Any other rule would put in peril the school interests. Suppose, for illustration, that a contract providing for "good wages," "reasonable wages," "fair wages," or the like, is made, and when the time comes for opening the schools there arises a dispute as to what the compensation shall be, how shall it be determined, and in what mode can the teacher be compelled to go on with the duty he has agreed to perform? Until there is a definite contract it can hardly be said that a teacher has been employed, and the public interest demands that there should be a definite agreement before the time arrives for the schools to open, otherwise the school corporation may be at the mercy of the teacher or else there be no school. We think that a teacher can not recover from the school corporation for the breach of an executory agreement

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unless it is so full and definite as to be capable of specific enforcement. This principle is substantially laid down in the case of *Atkins v. Van Buren School Tp.*, 77 Ind. 447. There is much reason for scrutinizing with care contracts made so far in advance of the opening of the school year as was that here sued on, and sound policy requires that the terms should be so definitely fixed and made known that all interested may have full and reliable information. It is, we may say in passing, not altogether clear that the statute does not require that all contracts shall be in writing and be recorded, but we do not deem it necessary to decide that question.

Judgment reversed.

Filed Feb. 3, 1891.

No. 15,344.

JEWETT, TRUSTEE, v. PERRETTE ET AL.

PARTITION.—Action by Assignee in Insolvency.—Recording of Deed of Assignment.—Sufficiency of Allegation as to.—In an action for partition by the assignee of an insolvent debtor, an allegation in the complaint that the deed of assignment was *duly* filed and recorded in the recorder's office of the county in which the assignor resided and in which the real estate is situated, shows a compliance with the requirement of section 2663, R. S. 1881, that the deed shall be filed with the recorder of the county in which the assignor resides within ten days after its execution, and be recorded as other deeds.

SAME.—Deed of Assignment.—Exhibit.—The deed of assignment is not the foundation of such action, and the assignee is not required to file a copy of the instrument with the complaint as an exhibit.

SAME.—Action for.—Leave of Court.—An assignee in insolvency can not maintain an action for partition as a matter of course. Unless he makes it appear that it will be to the interest of his trust to bring the action, and that he is acting under the direction of the court, his action will fail.

From the Floyd Circuit Court.

VOL. 127.—7

Jewett, Trustee, v. Perrette et al.

C. L. Jewett, for appellant.

J. H. Stotsenburg, E. B. Stotsenburg and W. C. Utz, for appellees.

BERKSHIRE, J.—Henry C. Perrette, an insolvent, executed a deed of assignment under the voluntary assignment statute to one Charles W. Keeley, who refused to execute the trust, and upon proper petition the appellant was appointed assignee and took upon himself the duties of the trust.

Before executing the deed of assignment the assignor was the owner of an undivided interest in certain real estate situated in Floyd county, the title to which was covered by the deed of the assignor.

This action was brought by the appellant to obtain partition of the real estate.

A demurrer was addressed to the complaint and sustained, and the appellant having elected to stand by his complaint without amendment, the court rendered judgment against him for want of a complaint.

The only error assigned is predicated upon the court's ruling in sustaining the said demurrer.

The complaint is in the ordinary form for partition of real estate, but the appellees contend that there was no error in the ruling of the court, because: 1. It is not alleged that the deed of assignment was filed for record in the recorder's office within ten days after its execution. 2. A copy of the deed of assignment was not filed with the complaint as an exhibit; and, 3. An assignee of an insolvent debtor has no authority under the law to institute, and can not maintain, an action for partition.

The complaint alleges that the deed of assignment was duly filed and recorded in the recorder's office of Floyd county, Indiana, the county in which the assignor resided, and in which the real estate is situated.

We think this allegation broad enough to meet the requirements of the statute, which provides that the deed shall

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be filed with the recorder of the county in which the assignor resides within ten days after its execution, and recorded the same as other deeds are recorded. Section 2663, R. S. 1881.

Unless filed within the time and in the manner required by law, the instrument would not be duly filed. As this is an action for partition the deed of assignment is not its foundation, and therefore the appellant was not required to file a copy of the instrument with the complaint as an exhibit. *Cooper v. Perdue*, 114 Ind. 207.

We are not of the opinion that the assignee of an insolvent debtor can, under no circumstances, maintain an action for partition, but it is our opinion that he can not do so as a matter of course.

It is made the duty of the assignee to sell the property as it comes to him, as soon as possible after filing the appraisal which the statute requires, after giving thirty days' notice of the sale in the manner provided for. Section 2671, R. S. 1881.

The statute does not seem to contemplate partition proceedings, but it is provided that the court shall have supervisory power over the estate of the assignor, and may make such orders in the premises as will be to the interest of those who are interested in the estate. Section 2671, *supra*.

No doubt if the assignee, by virtue of his trust, is a tenant in common of real estate, he may, upon a proper showing, obtain an order from the court to bring and maintain an action for partition, and this it is his duty to do whenever it will be found to be to the interest of the estate so to do. Sections 2671 and 2674, R. S. 1881.

But unless it is made to appear by the assignee that it will be to the interest of his trust to bring an action to sever the joint estate, and only then, by direction of the court, is he within the authority which the statute confers.

As it does not appear by the allegations of the complaint here involved that the assignee was acting under the direc-

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tions of the court in bringing the action, and does not even appear that it will be to the interest of the trust to sever the common estate, we think the complaint is bad, and that the court committed no error in sustaining the demurrer thereto.

Judgment affirmed, with costs.

Filed. Feb. 3, 1891.

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No. 14,726.

WALKER v. LARKIN ET AL.

PRACTICE.—*Motion to Strike out Pleading.*—*Harmless Error.*—Overruling a motion to strike out parts of a pleading is not available error.

SAME.—*Contract.*—*Parol.*—*Presumption.*—A contract not alleged to be in writing is conclusively presumed to rest in parol; and available error can not be predicated on the overruling of a motion to make a complaint on contract more specific by alleging whether the contract was in writing or by parol.

LIFE INSURANCE.—*Insurable Interest.*—A creditor has an insurable interest in the life of his debtor.

SAME.—*Judgment Debtor.*—*Assignment of Policy.*—*Duress.*—*Estoppel.*—Where a debtor assigns a policy of insurance on his life to his creditor to secure a debt, and acquiesces in the assignment for many years, taking no steps to avoid it, and knowing that it was necessary to pay the premiums to keep it alive, he can not, in a suit on the policy, avoid the assignment on the ground of duress.

STATUTE OF LIMITATIONS.—*Life Insurance.*—*Payment of Premiums.*—*Repayment out of Proceeds.*—Where the insured assigns a policy of life insurance to a creditor to secure his debt, on which the assignee is to pay the premiums, which are to be repaid out of the proceeds of the policy, the fact that he paid such premiums more than six years before the policy matured, or before the commencement of the suit thereon, does not bar his right to apply the money when collected to a repayment of such premiums, the six years' statute of limitations having no application to such a case.

From the Orange Circuit Court.

G. W. Friedley, J. Giles and W. H. Edwards, for appellant.
M. F. Dunn and G. G. Dunn, for appellees.

Walker v. Larkin *et al.*

COFFEY, J.—This was an action instituted by the appellees in the Lawrence Circuit Court against the appellant and the Northwestern Mutual Life Insurance Company, on a policy of insurance issued on the life of the appellant. The insurance company, upon a proper pleading for that purpose, was permitted to pay into court the amount due on the policy of insurance, and was discharged.

The venue of the cause was changed to the Orange Circuit Court, where the appellees filed an amended complaint, which alleges, substantially, that the insurance company issued to the appellant the policy of insurance in suit for one thousand dollars on the 17th day of December, 1867, payable in nineteen years from date, in consideration of the payment of twenty-five dollars and thirty-three cents, and the quarterly payment of eleven dollars and thirty-six cents for a period of nineteen years; that, on the 31st day of January, 1870, the appellant assigned said policy to the appellees to secure the payment of two judgments against him in favor of the appellees, at which time it was agreed that the appellees should pay the premiums thereafter to accrue on said policy, and should be paid out of the proceeds of said policy, when collected, the amount of said judgments, and should be repaid the amount of the premium so paid by them, with the interest thereon; that they paid premiums to the amount of \$800, which, together with said judgments, amounts to the sum of \$1,070.59, which sum exceeds the amount due on the policy; that by reason of these facts the appellant has no interest in the money paid into court by the insurance company.

The court overruled a motion, made by the appellant, to strike out so much of the complaint as alleged the payment of premiums by the appellees. It also overruled a motion to compel the appellees to make the complaint more specific, by alleging whether or not the agreement to pay premiums was in writing.

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The court also overruled a demurrer to the complaint, and appellant excepted.

These several rulings are assigned as error.

Overruling a motion to strike out parts of a pleading is not available error. *Keesling v. Watson*, 91 Ind. 578; *McFall v. Howe, etc., Co.*, 90 Ind. 148; *Losey v. Bond*, 94 Ind. 67; *Morris v. Stern*, 80 Ind. 227.

The complaint is sufficiently definite in the matter of which complaint is made. A contract not alleged to be in writing is conclusively presumed to rest in parol.

The only objection urged to the complaint is that it does appear therefrom that the appellees had an insurable interest in the life of the appellant.

It appears from the complaint that the appellant was indebted to the appellees in the sum of one hundred and eighty-nine dollars, the amount of two several judgments in their favor against him. The policy was assigned to them as collateral security for the payment of these judgments. The authorities all agree that the creditor has an insurable interest in the life of his debtor. *Amick v. Butler*, 111 Ind. 578. In that case it was said by this court: "That a creditor has an insurable interest in the life of his debtor has never been controverted."

The court did not err in overruling the demurrer of the appellant to the complaint.

The appellant filed an answer in six paragraphs.

The third paragraph avers, substantially, that the assignment of the policy in suit was procured as follows: That the appellees, to induce the appellant to assign the same, charged him with being guilty of some crime, or with being about to leave the State of Indiana with the intent to defraud creditors, or some offence against the laws of the State of Indiana, the nature of which offence he is not now able to give, as the record of such proceeding has been totally destroyed; that they had him restrained by force of his liberty, and threatened to have him arrested, and did have him

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under arrest, and threatened to have him imprisoned on some charge ; that at the time he was under such arrest and restrained of his liberty, he was sick and unable to see or employ counsel or to look after his case, and the appellees threatened to have him thrown into prison if he did not execute said assignment ; that to free himself, and to avoid arrest and imprisonment, and without any consideration therefor, and against his will, he signed said assignment ; that he was wholly innocent of said charge, and the same was made without any foundation in fact.

The sixth paragraph of the answer set up the six years' statute of limitations as to the premiums paid by the appellees on the policy of insurance.

The court sustained a demurrer to each of these answers, and the appellant excepted.

It is well settled that an executory contract, executed by one under duress, or under illegal arrest, to obtain his release from such arrest may be avoided by the person so executing the same. So if a person executed an instrument from a well-grounded fear of illegal imprisonment, he may avoid it on the ground of duress. *Rush v. Brown*, 49 Ind. 573 ; *Town of Princeton v. Vierling*, 40 Ind. 340 ; *Bennett v. Ford*, 47 Ind. 264 ; *Town of Ligonier v. Ackerman*, 46 Ind. 552.

But if a person under legal arrest makes a promise to pay a debt, he can not avoid it on the ground of duress. *Shephard v. Watrous*, 3 Caines, 166 ; *Bowker v. Lowell*, 49 Maine, 429.

In this case the answer attempting to set up duress is very uncertain and indefinite. It avers that the appellees charged the appellant with being guilty of some crime, or with being about to leave the State of Indiana with intent to defraud creditors, or some offence against the laws of the State of Indiana, the nature of which offence he is unable to give. The appellant seems to entertain as much doubt upon the question as to whether he was under arrest, or whether an

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arrest was only threatened, as upon the nature of the charge against him. The answer, in our opinion, is too uncertain and indefinite to present any question for the consideration of the court.

A pleading, to be good, should be certain to a common intent, at least.

The answer admits that the appellant owed the judgments set up in the complaint, and that the appellees had paid to the insurance company a large sum of money to keep the policy alive, and it does not aver that any steps were taken by the appellant to avoid the assignment at any time before the commencement of this suit. Duress does not render a contract absolutely void, but will enable a party so under duress to avoid it at his option. The appellant having acquiesced in the assignment of the policy in suit for many years, taking no steps to avoid it, knowing that it was necessary to pay the premiums in order to keep it alive, should not be heard to say now that the assignment was not valid. In our opinion the court did not err in sustaining a demurrer to this answer.

The six years' statute of limitations has no application to the case. In the event the appellant lived, the policy was not payable until the expiration of nineteen years from its date. The premiums paid by the appellees were to be repaid to them out of the proceeds of the policy when collected.

The fact that they paid such premiums more than six years before the policy matured, or before the commencement of this suit, would not bar them of their right to apply the money, when collected, to a repayment of such premiums.

The court trying the cause made a special finding of the facts proven, and stated its conclusions of law thereon. The facts found are substantially the same as those alleged in the complaint.

It appears from the finding of facts that the amount paid into court by the insurance company was \$731.34. The

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amount due the appellees on account of their judgments and on account of premiums paid by them, with the interest thereon, was at the time of the trial of this cause \$1,071.22.

The court stated as a conclusion of law that the appellant had no interest in the money paid into court by the insurance company in discharge of the policy. We do not think the court erred in this conclusion.

Some other questions are presented by the record in this cause which we have duly considered, but as they do not affect the merits of the controversy between the parties they need not be stated in this opinion.

There is no available error in the record.

Judgment affirmed.

Filed Feb. 3, 1890.

No. 14,817.

BARNES ET AL. v. ZOERCHER.

[127 105
141 450]

EXECUTION.—Sale.—Separate Bids.—Holding in Abeyance.—The sheriff, under an execution, first offered the lots for sale separately. The judgment debtor, through his attorney, bid for the separate parcels a sum insufficient to satisfy the execution, and the sheriff held the bids in abeyance until he offered the property as a whole. The debtor, whose bid on the property at that time was the highest, being unable to pay the full amount bid, the attorney, on the refusal of the sheriff to grant an extension of time, withdrew his last bid, and the property was sold to another for more than the aggregate amount of the separate bids.

Held, that the sale was valid, as there was no abuse of discretion by the sheriff.

From the Perry Circuit Court.

C. H. Mason, for appellants.

E. E. Drumb and *J. F. Patrick*, for appellee.

McBRIDE, J.—This was a suit in ejectment. Appellee

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brought suit against appellants to recover possession of five town lots, to which he claimed title under a sheriff's deed. Appellants insist that the deed is void because of the manner in which the sale was made by the sheriff, and this presents the only question in the case.

The sheriff offered the rents and profits of each of the five lots separately, then grouped them together, offering the rents and profits of two, three, etc., and then of all together, and, receiving no bids on any of these offers, he offered the fee simple of the lots separately. For the first lot offered appellant bid \$20, which was the highest and best bid therefor. The sheriff, by direction of appellee's attorney, refused to knock off the property at this bid until after said lots should have all been offered separately, and then in groups, and then all together, in order to ascertain in which manner they would bring the most money, before any bid should be accepted, unless a single lot should sell for enough to pay the entire debt and costs.

Appellant, by her attorney, protested against this manner of selling, but the sheriff, disregarding this protest, thereupon offered another lot, for which appellant bid \$26, which was the highest and best bid therefor. The sheriff also refused to knock off this lot at this bid, assigning the same reasons. He then offered the three remaining lots singly in fee simple, and, receiving no bid for either of them, he offered two of them together without effect, and then offered the fee simple of the three together. For the three appellants then offered \$26, which was the highest and best bid therefor. The bids thus made by appellant in all amounted to \$72. The sheriff also refused appellant's bid of \$26 for the three lots. He then, over appellant's protest, offered all the lots *in solido*, for which appellee bid \$74 and appellant bid \$74.05, still under protest. The lots were thereupon knocked down to appellant at \$74.05, which was the highest and best bid therefor.

Appellant was not present in person, but was represented

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by her attorney, who then informed the sheriff that he had not money enough to pay the entire amount bid; that his client had only furnished him with \$55, which she had thought sufficient to cover the amount for which the property would be likely to sell, and asked for time in which to get the balance of the money. This the sheriff refused to give, and said that unless the money was paid at once he would at once re-offer the property for sale. The attorney, while declaring his readiness and ability to pay the amount of the first two bids, and offering so to do, withdrew his bid of \$74.05 for the five lots *in solido*. The property was at once, within the hour fixed in the notice, and before the bidders had gone, again offered, as it had been previously offered, and when the fee simple of the five lots was again offered together, appellee again bid \$74 therefor, for which sum they were then struck off to him.

The facts in this case are substantially the same as in *Barnes v. Zoercher*, 126 Ind. 434, except that in that case the evidence showed that the attorney withdrew all bids made by him, while in this case he only withdrew the one bid of \$74.05.

That suit was between the same parties, and was brought to set aside the sale, and was therefore a direct attack upon it, while here the attack is collateral.

The law, in requiring the sale of a debtor's land in parcels, aims to guard against the danger of the sale of any more of his property than is necessary to discharge his debt and costs. This requirement is therefore in his interest and for his protection.

It is also to the debtor's interest that the property that is sold should bring the highest price obtainable, and the sheriff, in his conduct of the sale, should aim to accomplish that end. This court has repeatedly recognized the necessity of leaving a wide range of discretion to the sheriff in making sales of real estate.

In *Nix v. Williams*, 110 Ind. 234, it is said, that "Much

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is necessarily confided to the discretion of the sheriff in making sales of real estate, and a sale will not be set aside unless it clearly appears that there has been an abuse of this discretion, to the substantial injury of the execution defendant." See, also, *Jones v. Kokomo Building Ass'n*, 77 Ind. 340; *Bardeus v. Huber*, 45 Ind. 235.

We think it is a proper exercise of the discretion with which the sheriff is clothed in such cases as this, to withhold approval or acceptance of bids made on the several tracts separately, if for less than the debt and costs, until he has offered each tract and all the tracts in all the modes prescribed by law, unless at any time before all has been thus offered he receives a bid sufficient in amount to discharge the entire debt and costs.

In this case it clearly appears that there has been no abuse of this discretion.

The bids for the several tracts aggregated only \$72, while, when they were offered together, they sold for \$74, which the evidence shows was \$19 more than appellant had expected them to sell for. The course pursued by the sheriff therefore enured to her benefit rather than worked her harm. Even if the course pursued by the sheriff had been unauthorized, it was not an abuse of discretion of such character and attended with such results as would render the sale void. It would be at most a mere irregularity. If harm resulted to interested parties from such conduct the sale might be avoided by a direct proceeding, but it could not be attacked collaterally. *Jones v. Kokomo Building Ass'n, supra*; *Elston v. Castor*, 101 Ind. 426; *Davis v. Campbell*, 12 Ind. 192. The court below committed no error.

Judgment affirmed, with costs.

Filed Feb. 3, 1891.

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No. 14,871.

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127	109
142	192
127	109
156	468

CONSTITUTIONAL LAW.—*City Ordinance.—Pawnbrokers.—License.—Examination of Goods.—Police Power.*—An ordinance of the city of Fort Wayne making it unlawful for any person to carry on the business of a pawnbroker without having first procured a license, and making it the duty of every person engaged as a licensed pawnbroker to keep at his place of business a book in which he shall enter a description of the personal property pawned, the time when it was received, noting any descriptive marks found on the same, with the name and residence of the person by whom it was left, and providing that such book and such personal property should be subject to the inspection of the police power of the city, is not a violation of the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, as the business of the pawnbroker is subject to the police power of the State; but as the State has not declared the business of a pawnbroker unlawful, nor conferred on municipal corporations the power so to do, the city has no power to require a license of pawnbrokers, and the ordinance is void.

From the Allen Circuit Court.

R. S. Robertson, for appellant.

H. Colerick, for appellee.

COFFEY, J.—This was an action by the appellee against appellant, commenced before the mayor of the city of Fort Wayne, for an alleged violation of a city ordinance.

The appellant interposed a motion before the mayor to quash the affidavit in the cause, which was overruled. Upon a trial he was convicted and adjudged to pay the sum of twenty-five dollars, from which judgment he appealed to the Allen Circuit Court. In this court he renewed his motion to quash, which was overruled, and he excepted. Upon a trial he was again found guilty, and adjudged to pay the sum of fifteen dollars.

From this latter judgment he appeals to this court.

The affidavit in the cause is based upon section seven of

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an ordinance of the city of Fort Wayne, which ordinance purports to regulate the business of pawnbrokers.

Section one of the ordinance makes it unlawful for any person to carry on the business of a pawnbroker in said city without having first procured a license so to do.

Section two defines a pawnbroker within the meaning of the ordinance.

Section six makes it the duty of every person engaged in said city as a licensed pawnbroker to keep at his place of business a book in which he shall enter, in writing, a minute description of all personal property received on deposit, or by purchase, the time when it was received, giving particular mention of any prominent or descriptive marks found on the same, together with the name and residence of the person by whom it was left.

Section seven of said ordinance is as follows:

“Section 7. Every person or persons so licensed as aforesaid shall, during the ordinary hours of business, when requested by the mayor, marshal, captain of police, or any police officer of said city, submit and exhibit such books as in the sixth section provided for, to the inspection of said mayor or officer of the police department, and shall exhibit any goods, personal property, bonds, notes or other securities that may be so left with such licensed person, to the inspection of such mayor or officer of the police department, and every such licensed person refusing to submit said books, goods, personal property, bonds, notes or other securities as aforesaid, upon request of the mayor, or any officer of the police department of said city, shall forfeit to the city of Fort Wayne any sum not exceeding one hundred dollars.

The affidavit in this cause charges that the appellant violated section seven, above set out, in refusing to submit to the inspection of the deputy marshal of said city, upon proper request, a certain coat and vest which had been left with him as a pawnbroker.

It is contended by the appellant:

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First. That the ordinance in question is in contravention of the constitutional privileges of the citizen as reserved in the bill of rights contained in the Constitution of the United States and of the State of Indiana.

Second. That there is no legislative enactment which authorizes such an ordinance, and that the ordinance is for that reason void.

The Constitution of the United States provides that "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures shall not be violated; and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched and the person or things to be seized." Section 28, R. S. 1881.

This provision is literally copied into our State Constitution. Section 56, R. S. 1881.

Notwithstanding these constitutional provisions it is well settled that the respective States of the Union, and municipal corporations, when the power is conferred by the State, may, in certain cases, prescribe rules and conditions under which a particular business may be carried on, and require a license as a condition precedent to the right to conduct such business. Thus it is held that in the exercise of the police power, municipal corporations may, when empowered by the State, require a license of peddlers, hackmen, draymen, omnibus drivers, retail liquor dealers, showmen, green grocers, billiard saloons, pawnbrokers, and many other occupations. All the authorities agree that the business of the pawnbroker is a proper matter for regulation by the police power.

Cooley, in his valuable work on Constitutional Limitations (6th ed.), p. 744, in discussing the police power, says: "It is also common to require draymen, hackmen, pawnbrokers, and auctioneers to take out licenses, and to conform to such rules and regulations as seem important to the public convenience and protection."

Horr and Bemis, in their work on Municipal Police Or-

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dinances, section 213, in a list of cases where it has been held that the police power was properly exercised, include pawnbrokers, and say they may be required to deliver to the police authorities before midnight of each day a list of all articles received that day, together with a description of the pledgeors.

In the case of *Van Baalen v. People*, 40 Mich. 258, it was held that a license fee of two hundred dollars required of pawnbrokers in the city of Detroit, as a condition precedent to their right to do business in that city, was not unreasonable.

The case of *Lauder v. City of Chicago*, 111 Ill. 291, involved substantially the question now under discussion. In that case the city of Chicago passed an ordinance requiring all persons engaged in the business of pawnbrokers to take out a license.

The ordinance required persons engaged in such business to keep a book, similar to the one required by the ordinance now before us, and provided that the same should be subject to the inspection of the police power of the city. It further required all persons engaged in such business to make out and deliver to the superintendent of police, every day, before the hour of noon, a legible and correct copy of such book, showing the personal property or other valuable thing received on deposit or purchased during the preceding day, together with the time (meaning the hour) when received or purchased, and a description of the person or persons by whom left in pledge, or from whom the same was purchased.

The same objection was urged against this ordinance that is urged here, namely, that the citizen was protected in his person, house, papers and effects against unreasonable search. The court, in answer to this objection, said: "We do not regard the ordinance as being 'unjust, unreasonable, tyrannical and oppressive.' The requirements objected to are but reasonable means to keep the pawnbrokers' business free from great abuse by thieves disposing of stolen goods in their

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shops. They are all made in the interest of the public, and are intended for the detection and prevention of crime. * * *

"It is well known that in our great cities thieves and the receivers of stolen property often dispose of the fruits of their crime by sale to second-hand dealers, or by pledge or sale to pawnbrokers, who may be perfectly free from any intention or disposition to aid such criminals. Such an ordinance also has a tendency to protect even such dealers and brokers from imposition and loss."

In view of these authorities we are constrained to hold that the business of the pawnbroker is subject to the police power of the State, and that regulations, such as are contained in the ordinance we are now considering, are not in conflict with the provisions of the Constitution of the United States above set forth.

It remains to inquire whether the State, by proper legislation, has conferred upon the city of Fort Wayne the power to enact the ordinance now before us. The ordinance, in terms, applies only to such pawnbrokers as are licensed by the city to transact business, and has no application to persons not possessing such license, save as it requires all persons to take out a license as a condition precedent to the right to carry on the business of a pawnbroker. We need not inquire, therefore, as to whether such city possesses the power to regulate the business when carried on without a license, as in this case the validity of the ordinance depends upon the right of the city to demand a license, as a condition precedent to the right to do business at all; for if no person can be legally licensed there is no one to whom the ordinance can apply.

It is virtually conceded that section 3106, R. S. 1881, does not in direct terms confer upon cities the right to demand a license of pawnbrokers, and the power to regulate their business. Indeed, in that section no mention is made of this class of business. This section confers upon cities the power

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to regulate or prohibit the use of hand-organs, to prevent or prohibit the use of fire arms, to preserve peace and good order, to prevent vice and immorality, to suppress gaming and gaming-houses, and houses of ill-fame, to restrain fraudulent practices in the city, to direct the location of market and slaughter-houses and magazines, to regulate the use of coaches, hacks, drays, and other vehicles for the transportation of passengers or freight, to regulate and license inns, taverns, or other places used or kept for public entertainment, shops or other places kept for sale of liquors to be used in or upon the premises, to regulate and restrain all tables, alleys, machines, devices or places of any kind for sports or games, to regulate and restrain theatrical and other public exhibitions, to restrain and punish vagrants, mendicants, street beggars, etc., to regulate the ringing of bells and crying of goods, and to restrain hawking and peddling, to regulate the establishment of gas-works, to regulate markets, sales of meat, vegetables and fish, to establish stands for hackney coaches, cabs and omnibuses, to regulate the sales of all kinds of property at auction, and to license auctioneers, but no mention whatever is made of the business of pawn-brokers.

The appellee claims that the power to enact the ordinance in question is conferred by section 3155, R. S. 1881, commonly called the general welfare clause. That section provides:

“The common council shall have power to make other by-laws and ordinances not inconsistent with the laws of this State, and necessary to carry out the objects of the corporation, and to enforce the observance of all by-laws and ordinances, by enacting penalties for their violation,” etc.

The right to license must be plainly conferred or it will not be held to exist. 1 Dillon Mun. Corp. (4th ed.), section 361.

To license one means to confer upon him the right to do

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something which he would not have the right to do without such license.

The object of a license is to confer a right which does not exist. Tiedeman Limitations of Police Power, p. 285; *Mayor, etc., v. Charlton*, 36 Ga. 460; *Chilvers v. People*, 11 Mich. 42.

"The power to license must be granted in express terms, although it is merely a police power. It is one mode of regulation, but one that can not be exercised under general police authority. But a grant of power to control or suppress would carry with it the power to license." Horr and Bemis Mun. Police Ordinances, section 256.

"The power to license depends upon the concurrent power to prohibit. The business or occupation is declared unlawful, except upon compliance with certain conditions. A license, then, 'is a privilege granted to carry on some occupation or exercise some right which could not be legally exercised without the grant of such license. The pursuit of the prohibited occupation becomes a franchise in the power of the municipality to grant, and the license fee is the price exacted for the right to exercise the franchise.'" Horr and Bemis. Mun. Police Ordinances, section 257; *Chilvers v. People*, *supra*.

In *Barling v. West*, 29 Wis. 307, it was held that the "general welfare" clause, in a statute like ours, does not authorize the imposition of a license for engaging in a lawful business.

Our State has not seen fit to declare the business of a pawn-broker unlawful, nor has it conferred on municipal corporations the power to declare it unlawful. Any person desiring to do so may engage in the business until such time as the Legislature, in its wisdom, may, in the exercise of the police power of the State, declare it unlawful.

As it was not unlawful for the appellant to engage in the business of a pawnbroker in the city of Fort Wayne, and as that city, under existing laws, had no power to prohibit him

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from doing so, it follows, we think, that it had no power to require of him a license as a condition precedent to the carrying on of such business.

All licenses are in their nature restrictive, and a municipal corporation can not restrict a lawful business unless the power to do so is conferred by the State.

The whole ordinance before us proceeds upon the theory that cities have the right to demand of pawnbrokers that they shall take out licenses as a condition precedent to the right to do business. In all the States where it has been held that a city may demand a license of pawnbrokers, the authority to do so was expressly conferred by statute. Without approving all that is said in the authorities above cited upon the subject of privileges granted by a license, we are of the opinion that the ordinance now under consideration is void, and the court, for that reason, erred in overruling the appellant's motion to quash the affidavit.

Judgment reversed, with direction to the circuit court to sustain the motion of the appellant to quash the affidavit in this cause and to dismiss the action.

Filed Jan. 31, 1891.

No 14,553.

WATTS, TRUSTEE, ET AL. v. SWEENEY ET AL.

MECHANIC'S LIEN.—*Provision for Enforcement.*—A mechanic who repairs a chattel has a lien upon it, which he may enforce under sections 5304 and 5305, R. S. 1881. The former section does not declare a lien, but provides the manner of enforcing the common law lien given to a mechanic making repairs on a chattel.

SAME.—*Statute Liberally Construed.*—The statute providing for the enforcing of the lien upon the article repaired must be liberally construed.

SAME.—*Mechanic Furnishing Materials.*—A mechanic who furnishes the materials with which to alter or repair a chattel intrusted to him for that

127	116
138	565
127	116
142	558
127	116
148	89
149	605
127	116
155	440
156	441
158	284
127	116
159	592
127	116
165	290
165	509
127	116
166	4

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purpose has a lien thereon, as much so as if the owner of such chattel furnished such materials.

SAME.—*Priority of Mechanic's and Chattel Mortgage Liens.*—If a mortgagor, by the terms of the mortgage, retains for a long time the possession of the chattel mortgaged, and retains it long after the debt secured is due, for the purpose of earning money with which to pay off the mortgage debt, the presumption is that such chattel is to be kept in repair; that it would be intrusted to a mechanic to make the necessary repairs, and such mechanic has a lien for such repairs that is superior to the lien of the mortgagee.

SAME.—*Mortgagor Agent of Mortgagee.*—If a mortgagee, even by the terms of the mortgage, permits the mortgagor to retain the property mortgaged for a long period of time, when it is property, as a railroad locomotive, liable to need repairing, the court will presume that he constituted the mortgagor his agent to employ a proper person to make such repairs when necessary, and the lien thus created will be held superior to the mortgagee lien.

SAME.—*Sale to Enforce a Mechanic's Lien.*—A sale under sections 5304 and 5305, R. S. 1881, when their terms have been complied with, passes to the purchaser a complete title to the property purchased.

SAME.—*Quieting Title to Personality.*—A defendant, who has a title to a chattel which is superior to the lien of a chattel mortgage thereon, may file a cross-complaint in a foreclosure proceeding to quiet his title thereto; and if the plaintiff dismiss such proceeding the defendant may proceed on his cross-complaint to quiet his title to such chattel.

PLEADING.—*Plea in Abatement.*—*Order of Filing.*—A plea in abatement, filed after a plea in bar, will be stricken out on motion, even though the plea in bar was withdrawn, by leave of court, for the purpose of filing such plea in abatement, before the latter was filed.

SAME.—*Dismissal of Complaint.*—A dismissal of the action by the plaintiff after a cross-complaint filed by the defendant does not operate as a dismissal of the cross-complaint.

From the Harrison Circuit Court.

W. N. Tracewell and R. J. Tracewell, for appellants.

M. Z. Stannard, for appellees.

OLDS, C. J.—On September 12th, 1883, the Louisville, New Albany and Corydon Railway Company, for the purpose of securing the payment of its negotiable bonds and interest coupons thereto attached, executed to appellant a mortgage upon its real estate, its road and its equipments, including an engine called the "Samuel J. Wright," which mort-

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gage was, on said day, recorded in the office of the recorder of Harrison county, Indiana, in Record No. 12.

On August 4th, 1887, appellant filed in the Harrison Circuit Court his complaint for the foreclosure of the mortgage, making defendants to said action, among others, the appellees Sweeney and Sweeney.

Appellees Sweeney and Sweeney filed an answer to the complaint, and also filed a cross-complaint.

Appellant then dismissed his complaint as to Sweeney and Sweeney.

Issues were joined between appellees and appellant Watts, trustee, upon the cross-complaint, and a trial was had and judgment rendered upon the cross-complaint in favor of the appellees.

The following errors are assigned:

1st. That the court erred in overruling the separate demurrer of the appellant to the first paragraph of the cross-complaint of the appellees.

2d. The court erred in sustaining the demurrer of the appellees to the plea in abatement filed by appellant to the cross-complaint of the appellees.

3d. The court erred in sustaining the demurrer of the appellees to the second paragraph of the separate answer of the appellant to the cross-complaint of appellees.

4th. The court erred in overruling the separate motion of appellant to separately docket and try the cross-complaint of appellees.

5th. The court erred in overruling the motion by appellant for a new trial on appellees' cross-complaint.

6th. The cross-complaint of appellees does not contain sufficient facts to constitute a cause of action against appellant.

It is alleged in the cross-complaint "that, on the 15th day of May, 1885, and for three years prior thereto, and ever since said date, the appellees Sweeney and Sweeney were, and had been, engaged under the firm name of M. A. Sweeney

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& Brother, in running and operating a foundry and machine shop at the city of Jeffersonville, county of Clark, and State of Indiana, for the purpose of building and repairing engines, locomotives, and other machinery for railroad companies, steamboat companies and the general public; that they admit the execution of the mortgage to the plaintiff in trust, as in his complaint herein set forth and declared, and that the same was for the uses and purposes therein mentioned. It is further admitted that the conditions of said mortgage were broken by non-payment of interest upon the bonds referred to and secured thereby and at the time therein set out, and that then and there, and by reason thereof, the plaintiff became entitled to the possession of all the personal property covered by said mortgage, including the said engine and tender number one(1), and named the "Samuel J. Wright," but the defendants aver that notwithstanding the premises, the plaintiff permitted their co-defendant, the Louisville, New Albany and Corydon Railway Company, the mortgagor thereof, to continue to hold, use and operate the railroad, machinery and rolling stock named in said mortgage (including said engine and tender), for a long time after the same became forfeited as aforesaid, to wit, for more than two years thereafter; that during all of said time, by the consent of the plaintiff, and to enable said mortgagor to pay the principal and interest of the debt secured by said mortgage, their said co-defendant was allowed to remain so in possession and control of and operate the said railroad, and to run the said locomotive engine and tender; that by reason of such use of said engine and tender in the manner and for the purposes aforesaid, the same became worn out, broken, out of repair, and of no service to the plaintiff or said mortgagor, for the purpose aforesaid, and in order to render said engine and tender fit for use, the same being then and there the only locomotive engine and tender owned by the plaintiff or said mortgagor, and to be used in operating said mortgaged railroad, and thereby to earn the means of liquidating said debt

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and interest, repairs became necessary thereto ; that said Louisville, New Albany and Corydon Railway Company, while so possessing and operating said railroad, locomotive engine and tender, intrusted the said engine and tender to the appellees as machinists and mechanics at their said place of business, at the said city of Jeffersonville, to the end that the same might be by the said firm, as such mechanics, over-hauled, repaired, altered, remodelled and rendered fit for use ; that while said engine and tender were so intrusted to them and under their care and control, and in their custody for the purposes aforesaid, they, as such firm, at the special instance and request of said mortgagor, expended and bestowed a large amount of money, to wit, eleven hundred and sixty-three dollars and fifty-six cents in providing material and labor in and about the necessary repairs, refitting and rendering fit for service the said engine and tender, thereby imparting increased value thereto in said sum ; that the repairs so made by these cross-complainants were necessary to be done, and the amount so expended was a reasonable charge for such repairs."

It is further averred " that long before the commencement of this suit the said repairs upon said engine and tender were completed, and their said reasonable charge for the same became then and there due, yet the same was not paid, and said engine and tender taken away, nor were said charges paid or tendered to said cross-complainants, or any one for them ; that the said charges for said repairs became due and payable to these cross-complainants on the 15th day of July, 1885 ; that after six months had elapsed from said last named date, to wit, on the 27th day of March, 1886, these cross-complainants, for the purpose of paying and satisfying their said charges, the same not having previously been paid, sold the said locomotive engine and tender at public auction on Pearl street, between Court avenue and Maple street, in the city of Jeffersonville, Clark county, State of Indiana, for cash, at the hour of ten o'clock A. M., on the 27th day of March,

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1886, the same not being susceptible of division without injury thereto ; that said articles exceeded in value the sum of ten dollars, and before making said sale said cross-complainants, as such mechanics, gave public notice of the time, place and terms thereof by advertisement for three weeks successively next before said sale, in the National Democrat, a weekly newspaper of general circulation, printed and published in said county of Clark, the same being the county in which said articles were so repaired and sold ; that said cross-complainants, being the highest and best bidders therefor, became the purchasers of the said engine and tender, and have ever since said time owned, held and possessed the same in pursuance of said sale and purchase ; that said plaintiff and the cross-complainants' co-defendant each claim to own some interest in said property by virtue of a mortgage filed with plaintiff's complaint and sought to be foreclosed in this action, a copy of which is filed herewith, made a part hereof, and marked 'Exhibit A ;' but these cross-complainants allege that neither said plaintiff nor their co-defendant has any interest whatever therein nor title thereto, and that their said claim and pretence cast a cloud upon the title of these cross-complainants to said property, and materially interfere with their use and enjoyment thereof, and prevent them from selling and disposing of the same. Wherefore these cross-complainants pray that the said cloud be removed from their title to said property, and their title quieted therein ; that plaintiff may be enjoined from foreclosing its said mortgage herein upon said engine and tender, and for such other and necessary relief in the premises as the nature and circumstances of this case may require."

The first question presented upon the facts alleged in the cross-complaint is as to the priority of the lien of the appellees over that of the mortgagee. The appellees had a lien upon the property for the materials furnished and labor performed in making the repairs ; this they would have had at common law, but the same lien which they had at common

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law is declared, and a method for its enforcement provided, by sections 5304-5, R. S. 1881.

This section is very awkwardly worded. It provides that "Whenever any person shall intrust to any mechanic or tradesman materials to construct, alter, or repair any article of value," etc. It is a remedial statute, and must be construed liberally, and a reasonable construction of it is that it was intended to apply to cases where articles of value are intrusted to a mechanic or tradesman to alter or repair, and, indeed, literally construed, it would apply to the case under consideration, for the engine and tender were intrusted to the appellees to alter and repair, and when so altered and repaired the engine and tender so intrusted to them were a part of the material which entered into and constituted a part of the same as repaired. This section does not declare a lien, but provides the manner of enforcing a lien which the mechanic has at common law, and it would be an imputation upon the intelligence of the legislative body enacting the section to hold that it was only intended to apply to a case where materials were furnished to alter or repair an article of value, and that it does not apply where the mechanic is intrusted with the article to be altered or repaired, furnishing his own materials for the repairs, in view of the fact that there is no other statute relating to such a case. The rights of the appellees are therefore governed by sections 5304-5, *supra*, in enforcing their lien.

The case presented by the cross-complaint shows the engine repaired was mortgaged with the other equipments of the railroad; that it was the only engine belonging to the mortgagor and used in operating the railroad, and by the terms of the mortgage was left in the possession of the mortgagor, and after the debt became due it was still permitted by the mortgagee to remain in the possession of the mortgagor, to be used by him in operating the railroad and earning the money to pay the mortgage debt, and that by virtue of such use it became worn, out of repair, and unfit for use,

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and was by the mortgagor in possession, long after the debt matured, and after there was a forfeiture of the conditions in the mortgage, intrusted to the appellees to repair. Under such circumstances the necessary implication was, and the fair presumption is, that the engine thus mortgaged, but retained by the mortgagor, to be used by him in earning money to pay the mortgage debt, was to be kept in repair; and the further presumption follows that it being machinery requiring skilled mechanics and machinists to repair, it would be intrusted to machinists to make necessary repairs, and such being the understanding of the parties to the mortgage, as fairly inferred from the nature of the machinery and use to be made of it, and by permitting it to be retained and used by the mortgagor long after the mortgage debt matured and the conditions of the mortgage forfeited, the mortgagee was bound to know that such mechanic or machinist would have a lien for the amount of the repairs.

When the mortgagee intrusts machinery of the character in controversy to the custody of the mortgagor for a long period of time, to be used by the mortgagor in operating the railroad, it will be presumed against the mortgagee that all necessary repairs were contemplated, and the mortgagor was, in case of needed repairs, constituted the agent of the mortgagee in procuring such repairs, and in such case equity gives the mechanic a lien for his services and materials. The repairs add to the value of the property, and they are for the benefit of the mortgagee as well as the mortgagor.

Where property is to be retained and used by the mortgagor for a long period of time, it will be presumed to have been the intention of the parties to the mortgage, where it is property liable to such repairs, that it is to be kept in repair, and when the property is machinery, or property of a character which renders it necessary to intrust it to a mechanic or machinist to make such repairs, the mortgagor in possession will be constituted the agent of the mortgagee to procure the repairs to be made, and as such necessary repairs

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are for the betterment of the property, and add to its value to the gain of the mortgagee, the common law lien in favor of the mechanic for the value of the repairs is paramount and superior to the lien of the mortgagee. The mortgagee is presumed in such case to have contracted with a knowledge of the law giving to a mechanic a lien.

Where the lien is purely a statutory one, or where the property is of such a character that it would not be reasonable to anticipate the necessity for any needed repairs for the period of time the property is to or does remain in the possession of the mortgagor, or when it is but reasonable to expect the mortgagor in person to care for or repair the property, in such cases a different rule may prevail.

In the case of *Hanch v. Ripley*, *post*, p. 151, it was held that the lien of an agister for feeding horses was not superior to a chattel mortgage, but the agister is given a lien by statute, and it would be the natural presumption that if the mortgagor retained the possession of horses or live stock, he was to feed and care for the same.

In *Jones Chattel Mortgages* (2d ed.), section 473, it is said: "Where the subject of a mortgage was a hack let for hire, and it was described as 'now in use' at certain stables, and it was stipulated that the mortgagor might retain possession and use it, it was regarded as the manifest intention of the parties that the hack should continue to be driven for hire, and should be kept in a proper state of repair for that purpose, not merely for the benefit of the mortgagee, but for that of the mortgagor also, by preserving the value of the security and affording a means of earning wherewithal to pay off the mortgage debt," and this is the holding in the case of *Hammond v. Danielson*, 126 Mass. 294.

It is the recognized rule that when the mortgagee of a ship allows the mortgagor to continue in possession as the apparent owner, making it a source of profit wherewithal to pay off the mortgage debt, the mortgagor has the implied right to do all that is necessary to keep the ship in repair,

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and it is inferred that he has the right to procure such repairs to be made on the usual and ordinary terms, and such terms give the shipwright a lien for the work done and the labor expended. *Jones Chattel Mortgages*, section 535; *The De Smet*, 10 Fed. Rep. 483, and note on p. 489; *Scott v. Delahunt*, 65 N. Y. 128. See, on question of liens, *Jackson v. Cummins*, 5 M. & W. 341.

In 1 *Jones Liens*, section 744, the doctrine is stated to be that the mortgagor's authority for the creation of a lien on the mortgaged property may be implied from the mortgagor being allowed to remain in possession of the chattel, and the lien of the mechanic is prior to the lien of the mortgagee.

The averments of the complaint show that section 5305 was fully complied with in making the sale. Notice was published in accordance with the requirements of said section, and a sale made in accordance with the sections; a sale under sections 5304 and 5305 passes a complete title to the property to the purchaser. There was no error in overruling the demurrer to the complaint.

The next question presented is as to the ruling of the court on the demurrer to the appellant's plea in abatement. This plea shows that prior to the commencement of this action appellant had filed his complaint in the Circuit Court of the United States for the district of Indiana against the appellees in replevin, alleging that the appellant had a special property in the engine and tender, by reason of the mortgage, and was entitled to the possession of the same by reason of the failure to comply with the conditions of the mortgage, and the appellees had alleged in their answer in said cause the same service performed on the engine and tender, the sale, and that they were the owners, alleging in said answer the same facts set up in their cross-complaint in this action, and that said cause was pending at the time of the commencement of this action and the filing of the cross-complaint and is still pending; also, alleging other formal

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matters showing that the United States court had jurisdiction in said action of replevin. The appellant first appeared to the cross-complaint and filed an answer in bar, and then with leave of court withdrew the answer in bar and filed an answer in abatement.

That when a party first files an answer in bar he can not afterwards file an answer in abatement, even by leave of court, has been settled by a decision of this court in the case of *Brink v. Reid*, 122 Ind. 257, and having been so held and the statute, section 365, R. S. 1881, providing that answers in abatement must precede and can not be pleaded with an answer in bar, we deem it best to adhere to the decision in that case. Pleas in abatement being dilatory pleas, a strict rule should be held in regard to them. The answer in abatement in this case having been filed after the filing of an answer in bar the same was subject to be struck out on motion. The same result was reached by sustaining a demurrer thereto, and there is no available error in the ruling.

The next alleged error discussed is the ruling of the court in sustaining appellees' demurrer to the second paragraph of appellant's answer.

This paragraph disclaims any intention on the part of appellant to affect in any way the appellees by the foreclosure of the mortgage, and states facts showing that the engine and tender were personal property in the hands of the appellees.

It is contended that this paragraph of answer is good, for the reason that the appellees, having the possession, can not maintain a suit to determine and quiet their title. However this may be as to maintaining an independent suit, in this case the appellant in his complaint sought a foreclosure of his mortgage upon the engine, and the appellees were made parties to the suit, and filed their cross-complaint, asking to have their ownership declared, and to enjoin and prevent a

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foreclosure against them as to the engine and tender. After the filing of the cross-complaint appellant dismissed his case as to the appellees. This did not take appellees' cross-complaint out, and the appellees had the right to have their title to the property settled and determined as between them and the mortgagee.

The facts alleged in the cross-complaint entitled the appellees to some relief, and the answer did not state facts showing they were not entitled to any. No objection is made as to the form of the judgment.

The next objection urged relates to the ruling of the court on the motion to separately docket and try the case on the cross-complaint, but it is conceded that this was a matter within the discretion of the trial court, and not a matter to which the appellant was entitled as of right. There was no error in this ruling.

The next question presented arises on the ruling of the court in overruling the motion for a new trial. It is contended that the evidence as to the notice and sale of the engine and tender were improperly admitted, for the reason that such sale was unauthorized. This objection is not well taken. The statute authorized the sale.

Lastly, it is urged that the evidence does not support the finding. There is sufficient evidence to support the finding, and in such a case it will not be disturbed by this court.

There is no error in the record.

Judgment affirmed, with costs.

Filed Jan. 31, 1891.

Citizens Bank of Noblesville v. Harrison.

No. 14,624.

CITIZENS BANK OF NOBLESVILLE v. HARRISON.

BANKS.—*Application of Checks.—Rights of Holder.*—The husband of the plaintiff, as her agent, sold some wheat for her, and received therefor from the grain merchant a check payable at the defendant bank to himself or bearer. The check was delivered to a third party to be presented to the bank for payment. Such third party, on presenting the check, claimed a certain sum of the amount represented thereby as due him, and stated that the remainder belonged to the plaintiff's husband. The bank paid the sum claimed as due and applied the remainder to a debt due from the husband to the bank.

Held, that the proceeds of the check belonged to the plaintiff, and that the defendant having failed to pay the same on demand, she was entitled to recover in an action for money had and received.

Held, also, that the plaintiff was not bound to tender her check when she demanded payment.

From the Hamilton Circuit Court.

G. Shirts and A. F. Shirts, for appellant.

J. W. Booth, for appellee.

BERKSHIRE, J.—The appellee was the plaintiff below. She alleges in her complaint that on a certain date she was the owner of a lot of wheat of the value of \$92.15, and on said day her husband, acting as her authorized agent, sold the same to one Evans, a grain merchant, and received from him a check calling for \$92.15, payable at the appellant's bank; that said check was made payable to Mel Harrison (appellee's husband) or bearer; that the appellee was not present when said check was drawn and delivered, and had no knowledge of the terms thereof; that the appellee's said husband delivered the same to one Finch with directions to present the same to the appellant for payment at its place of business; that Finch presented said check to the appellant for payment at its said place of business and demanded payment; that the appellant received said check and cashed it and deposited the amount to the credit of the appellee's

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husband, and has refused to pay the said sum of money to the appellee though often requested so to do.

A demurrer was addressed to the complaint by the appellant and overruled and an exception reserved.

Thereupon the appellant filed an answer in one paragraph. The answer recites the facts as to the form in which the check was drawn and its presentation by Finch, as stated in the complaint, and alleges that at the time the check was presented the appellee's husband was indebted to the appellant by note long theretofore due, in the sum of \$300; that when Finch presented the check he only claimed \$5 of the amount which it called for as due to him, and in response to inquiries made by the appellant's cashier stated that the remainder belonged to Mel Harrison (appellee's husband); that the cashier then stated to Finch that he would pay to him the amount which he claimed and would deposit the remainder to the credit of Mel Harrison and apply the same to his indebtedness to the appellant; that Finch made no objection and the money was deposited and applied as stated; that no demand was made by the appellee for payment until long after the application of said money as stated; that the appellant had no knowledge of any claim upon said money by the appellee until long after its application as stated; that at no time has the appellee tendered to the appellant her check for said sum of money.

The specifications of error bring in question the rulings of the court in overruling the demurrer to the complaint and sustaining the demurrer to the answer. We think the ruling of the court in each instance was right.

If the appellant had paid the check in full to any person having control thereof, such payment would have satisfied the demand and protected the appellant, as the check was made payable to "Mel Harrison or bearer."

But the appellant made payment to no one; the attempted application of the proceeds of the check to the note of Mel

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Harrison held by the appellant was a useless performance unless the money which it represented was due to him.

In view of the allegations in the complaint and the answer as well, the proceeds of the check belonged to the appellee, and it became the appellant's duty to pay the same to her on demand, and having failed so to do it became liable to an action for so much money had and received to the use of the appellee.

The fact that the appellee was the wife of Mel Harrison, the drawee named in the check, did not give to the appellant any claim to the proceeds thereof that it would not have had had the money belonged to some other person. And it will hardly be claimed that had Harrison, as the agent of some neighbor, hauled and sold a lot of wheat, and taken a check drawn in the same form as the one in question, and presented it for payment, the appellant would have had the right to apply the proceeds to Harrison's note without the consent of the person whose wheat it represented.

The appellee was not bound to tender her check when she demanded payment; the appellant already held the check of Evans, the drawer, as a receipt against his deposit account.

The judgment is affirmed, with costs.

Filed Jan. 31, 1891.

127	130
129	356
127	130
145	32
145	152
127	130
149	281
149	282
127	130
165	132

No. 14,698.

THE TOWN OF MARION ET AL. v. SKILLMAN ET AL.

DEDICATION.—*Sufficiency of.*—All that is necessary to constitute a dedication of land to a public use is the assent of the owner of the soil to the use by the public, and the actual enjoyment by the public of the use for such a length of time that public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment.

SAME.—*Intent.*—To make a dedication complete, an intent on the part of the owner to dedicate must clearly appear.

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SAME.—*Assent of Owner.*—The assent of the owner to the public use need not be expressly declared, nor be manifested in any particular manner, but may be implied from the conduct of the owner of the land.

SAME.—*Implied.*—An implied dedication arises by operation of law from the acts of the owner of the land.

SAME.—*Irrevocable.*—A dedication once made is irrevocable; it is considered as in the nature of an estoppel *in pais*.

SAME.—*Use for Twenty Years Without Intent to Dedicate.*—Twenty years' use by the public under a claim of right, evidenced by the use, gives a right to the road or street of which the owner of the fee can not divest the public, whatever his intention may have been, not because an intent to dedicate is conclusively presumed, but because the statute of limitations has divested the owner of a right by destroying the remedy.

SAME.—*Width of Street Dedicated.*—*Example.*—North of a small unplatted tract of land in a town was a platted tract, and south of it a tract similarly platted, both plats within the town limits. A platted street in the north plat extended south to the north line of the unplatted tract; and a similar platted street, of the same width and name, began at the south line of such unplatted tract, in a direct line with the north street, and extended south through the south plat. That portion of the unplatted tract lying between where the street ended on the north and the other commenced on the south was unfenced and unoccupied to the full width of the streets, except a narrow strip on the west side covered by a hotel. Such had been the condition of the three tracts of land for more than twenty years, and the public had used the two streets, and the space across the unplatted tract as a street, for that length of time. *Held*, that there was a dedication of a strip across the unplatted tract to the full width of the two streets, except that portion occupied by the hotel, and that the three parts constituted one street.

STREET IMPROVEMENT.—*Enjoining.*—Before the courts will, at the suit of an abutting land-owner, enjoin municipal authorities in making street improvements, at the public expense at least, it must be shown that there has been a clear invasion of the rights of such complaining land-owner.

SAME.—*Irreparable Injury.*—Before an injunction will be granted, in such an instance, it must be shown that unless granted the abutting lot-owner would suffer irreparable injury.

SAME.—*Power to Assess for.*—A city or town can not compel abutting land-owners to pay for street improvements unless empowered so to do by statute; and when so empowered, the statute will be strictly construed.

SAME.—*Improvement at Public Expense.*—The power to make street improvements, to be paid for out of the city or town treasury, is liberally construed; and it is the exercise of a corporate function that is implied from the general words of the act of incorporation.

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SAME.—*Repairing.*—Power to assess abutting lot-owners with the cost of grading and paving a street does not, of itself, authorize a city or town to assess such owners with the cost of repairing such street.

SAME.—*Narrowing Improvement of Sidewalk.*—A city or town is not compelled to pave a sidewalk to the full width it has been formerly paved, from that fact alone; but it may narrow such improvement when it repaves it.

SAME.—*Width of Sidewalk.*—Town trustees have the power to determine what the width of a sidewalk shall be; and they are not required to make it of uniform width throughout the entire length of the street, nor to make the improvement of such sidewalk for the entire length of a uniform width.

From the Grant Circuit Court.

A. T. Wright, A. E. Steele, and J. A. Kersey, for appellants.

McBRIDE, J.—This was a suit for injunction by appellees against appellants. The court found the facts specially and stated its conclusions of law thereon. Appellants excepted, and the only questions necessary to be considered here arise on the assignment of error by appellants that the court erred in its conclusions of law.

The facts found by the court are substantially as follows: Appellees own and are in possession of a tract of land situate within the corporate limits of the town of Marion, containing $\frac{42}{100}$ acres, on which is situate a valuable hotel building. This land they and their vendors and predecessors in ownership had owned and occupied for more than twenty years when this suit was commenced and appellees had resided thereon for more than fifteen years prior thereto. No part of this land had ever been platted as an addition to said town, nor had any part of it ever been condemned, nor formally and by record dedicated as a street or part of said town. It was, however, surrounded by lands that had been thus formally platted in lots, streets and alleys. Lying north of and adjoining the land in question is what is known as "Clark Wilcott's addition" to said town, and south and adjoining the said land is what is known as "Pilcher's addition," and a certain street known as "Branson street" is laid out

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and used across both said additions, running north and south forty-nine and one-half feet in width, and a direct extension of said street from one of these additions to the other would pass over and across the east side of appellees' said land. Appellees' and their predecessors in the ownership of said land permitted the public and said town to use a strip of the east side of their said land as a public street and as a continuation of said Branson street from a time prior to the erection of said hotel building and for more than twenty years prior to the commencement of this suit. From the facts found it further appears that Branson street, as dedicated to the public on the plats of Clark Wilcott's addition, Pilcher's addition and the original plat of the town, in connection with the strip used by the public, with appellees' permission, across their said land, formed a continuous and straight strip extending entirely across said town of the uniform width of forty-nine and one-half feet, and that until the erection of the hotel building above referred to, there was no obstruction on appellees' land to the use by said town and the public of said Branson street in its uniform width of forty-nine and one-half feet. When the hotel building was erected is not shown save that it was since the public commenced the use of appellees' land as a part of said street and prior to March, 1887. When the hotel building was erected it was so placed that at its northeast corner it was six inches, and at its southeast corner thirty inches, east of the west line of said Branson street; or, in other words, if Branson street was extended across said land said building would extend into the street to that distance.

In March, 1887, one of the appellees, with others, petitioned the board of trustees of the town to cause the sidewalks on said Branson street, including the part thereof along and on said land, to be graded to the width of eight feet, and paved within said eight feet to the width of four feet. The board granted the petition, ordered the improvement made, and caused the engineer of the town to set stakes

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showing the line of the improvement and marking the outer or curb-line.

The finding is a little obscure as to the location of the curb-line, but as we construe it the curb-line was laid to correspond with the curb-line on other parts of the same side of Branson street.

The walk was then constructed in accordance with the order of the board of trustees, except that appellees, instead of improving the walk in front of their hotel building so as to conform to the boundaries indicated by the engineer, disregarded the curb-line fixed by him, and so constructed the walk that at the northeast corner of the building it extended six inches east and outside of the curb-line, and at the southeast corner it extended thirty inches outside thereof. In other respects, as to grade, width, material, etc., it conformed to the order made and the stakes set by the engineer.

The court finds this was rendered necessary by reason of the location of the hotel building as above stated, and that in order that the walk might be eight feet wide in front of the hotel building, it was necessary either to thus extend the walk outside the curb-line, or move the building back to that distance. This walk, after its completion, was accepted by the town.

In April, 1888, appellees, with others, petitioned the board of trustees of the town to cause Branson street to be graded and macadamized. The prayer of the petition was granted; and the necessary steps were taken by the board to grade and macadamize the street accordingly.

In order to carry out this work according to the plans and specifications adopted by the board, the court finds that "It will be necessary to take up and remove a portion of said sidewalk pavement so made by plaintiffs, to wit, a strip off the east side thereof six inches wide at the north end, and regularly increasing in width to thirty inches wide at the south end thereof."

The town authorities let the contract for the construction

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of the street improvement to appellant Philip Matler, and at the time this suit was commenced he was proceeding to construct the same, and was about to take up and remove that portion of appellees' sidewalk above described. If taken up and removed there would remain but five and one-half feet in width of sidewalk in front of the south end of said hotel, and seven and one-half feet at the north end. The object of this suit was to prevent the removal of that portion of the sidewalk, appellees' claim being that by its removal irreparable injury would be done to their said property.

The conclusions of law were in favor of appellees, and it was ordered that a temporary injunction previously granted be made perpetual.

We regret that we are compelled to pass upon the questions presented by this record without the aid of a brief from counsel for appellees.

Their contention, however, as we gather it from the record, seems to be that the town has never acquired the right to treat the strip of land in question as a part of Branson street; or, if their conduct has been such as to amount to a dedication, that the dedication is only of so much of the strip of land as lies outside the line of the hotel building, which line must be treated as the boundary, and the sidewalk and curb-line be adjusted accordingly; and that the threatened cutting away of a portion of the sidewalk, which they aver will render their property worthless, is an attempt on the part of the town to so widen Branson street at that point as to take a part of the land on which the building stands, which has never been dedicated to the public, and thereby deprive them of it without due process of law.

The statement which we have made of the facts as they were found by the court, is, we think, accurate and full as to all facts found which are necessary to a determination of the questions involved.

That property may be dedicated to a public use is a principle too well established to require any citation of authori-

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ties. As is also the principle that all that is necessary to constitute such dedication is the assent of the owner of the soil to the public use, and the actual enjoyment by the public of the use for such a length of time that public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment. *State v. Hill*, 10 Ind. 219; *Mauck v. State*, 66 Ind. 177; *Summers v. State*, 51 Ind. 201; *City of Indianapolis v. Kingsbury*, 101 Ind. 200. There must be in such cases an intent on the part of the owner to dedicate, and the intent to dedicate must clearly appear. *Dillon Munic. Corp.*, section 627 *et seq.* Such intent may be inferred from circumstances.

The assent of the owner to the use need not be expressly declared, nor be manifested in any particular manner, but may be implied from the conduct of the owner of the land. *Elliott Roads and Streets*, 99.

An implied dedication arises by operation of law from the acts of the owner. *Williams v. Wiley*, 16 Ind. 362; *City of Evansville v. Evans*, 37 Ind. 229; *City of Indianapolis v. Kingsbury*, *supra*; *Waltman v. Rund*, 109 Ind. 366.

It is considered as in the nature of an estoppel *in pais*, and once made it is irrevocable. *Elliott Roads and Streets*, 89 *et seq.*; *Dillon Munic. Corp.*, section 631, and cases cited; *Haynes v. Thomas*, 7 Ind. 38.

While the question of dedication from permissive occupation and use depends upon the intention of the owner, yet evidence of such occupation and use is one of the evidences of an intention to dedicate. No length of time can be fixed as necessary to enable a court or jury to find that there has been in fact a complete common law dedication. The question as to the intention of the owner of the land to dedicate it, is, in the majority of cases, one of mingled law and fact, although there may be cases where the facts are undisputed, and where they admit of but one legal interpretation, or can lead to but one conclusion, and in all such cases the ques-

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tion is purely one of law. *Elliott Roads and Streets*, 120 *et seq.*; *Kennedy v. Mayor, etc.*, 65 Md. 514.

When the use of the easement has continued for more than twenty years the rule as stated by some of the authorities is that the intention of the owner to dedicate will be conclusively presumed. We think, however, that the authors of *Roads and Streets*, above cited, state the principle more accurately when they say: "Twenty years' use by the public, under claim of right evidenced by the use, will give a right to the road or street, of which the owner of the fee can not divest the public, no matter what may have been his intention. * * * This result follows, not because an intention to dedicate is conclusively presumed, but because the statute of limitations has divested the owner of a right by destroying the remedy." *Elliott Roads and Streets*, 123.

As to so much of the land in question as is not covered by the hotel, we have no difficulty in holding that the public rights therein are as full and complete as if it had been formally and expressly dedicated by deed or plat. As to that portion covered by the hotel a different question is presented. Upon the facts found we think the permissive use by the public of the strip of land was evidence of an intention of the owners to dedicate to the public a strip thereof corresponding in width to the strip already existing in connection therewith immediately north and south of it. The inference of an intention to dedicate would not be simply to dedicate that portion upon which there was actual travel, but would evidence the intention of the owner that Branson street was to be continued across their land. *Bartlett v. Beardmore*, 77 Wis. 356; *Sprague v. Waite*, 17 Pick. 309; *Hannum v. Belchertown*, 19 Pick. 311; *Simmons v. Cornell*, 1 R. I. 519; *Cleveland v. Cleveland*, 12 Wend. 172.

If such use continued long enough before the erection of the hotel to make the dedication complete, the fact of the subsequent erection of the hotel would not affect the public right. A dedication once complete can not be revoked by

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the mere act of the owner. *In re Commissioner of Public Parks*, 6 N. Y. Supp. 779; Dillon Munic. Corp., section 631, and cases cited; *Mayor, etc., v. Franklin*, 12 Ga. 239.

In this case, however, there is no finding which shows how long the public use of the land had continued before the erection of the hotel. The finding is that such use commenced before the hotel was built, and had continued more than twenty years when the suit was commenced, but so far as the finding is concerned the hotel may have been erected within a month or a year after the commencement of such use, and we can not say that the public had prior thereto acquired any rights therein.

So far, then, as the facts are found in this case, we can only say that except for the strip actually covered by the hotel, the land in question constitutes a part of Branson street, and that the rights of the public therein are as complete, and the power of the board of trustees over the same as ample, as if there had been an express statutory dedication of it by the owners.

While in this State, by statute (section 3367, R. S. 1881), boards of trustees of incorporated towns are given exclusive power over the streets within the corporate limits of their respective towns, and are invested with large discretionary powers in the exercise of the duties thus imposed, there may arise many cases where it becomes the duty of the courts to interfere by injunction to prevent them exceeding their powers or abusing such discretion.

Judge Dillon says: "Generally speaking, equity will interfere in favor of, or against, municipal corporations, on the same principles by which it is guided in cases between other suitors." Dillon Munic. Corp., section 908.

While this is true, it was well said by the Supreme Court of New Jersey: "The process of injunction has been called the strong arm of the court, and it has been often said that to render its operation useful it must be exercised with great discretion, and only when necessity requires. Nor am I aware

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of any class of cases to which it should be applied with greater caution than to the proceedings of municipal corporations in the execution of public improvements." *Cross v. Mayor, etc.*, 18 N. J. Eq. 305.

We think it should be shown that there has been a clear invasion of the rights of a party to justify the courts in interfering by injunction with the conduct of municipal authorities in making street improvements of the character here in question.

The acts complained of are, that in the grading and macadamizing of the street they are proposing to cut away a portion of a sidewalk heretofore constructed by their order. In addition to the general statute heretofore referred to, which gives to boards of trustees of incorporated towns exclusive power over streets, etc., within the corporate limits of their respective towns, certain special powers are given them in relation to the grading and paving of sidewalks, and the grading, paving, gravelling and macadamizing of streets. Section 3357, R. S. 1881, provides that "Whenever in the opinion of the board of trustees of any incorporated town in this State, public convenience requires that the sidewalks of any street in such town should be graded or paved or planked, such board of trustees may, by an ordinance, compel the owners of lots adjoining such street to grade, pave, or plank the same." The three sections next succeeding prescribe the manner of doing this.

Section 3363 provides that in certain cases, upon petition of two-thirds of the resident owners of certain real estate, such board of trustees shall make certain improvements or repairs in streets and sidewalks.

Section 3364 provides that in certain cases, upon petition of a majority of the resident owners of certain lots or lands, such board of trustees may cause the grading, paving, gravelling or macadamizing of streets or parts of streets.

These statutes commit to the boards of trustees a wide discretion as to the making of such improvements. In so

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far as they empower the board to compel the abutters to do the work or pay for the same, under familiar and well settled principles they will be strictly construed, and they can exercise no powers except such as the statute expressly confers. For example, if the statute authorizes them to compel the adjacent lot-owner to grade and pave or plank a walk, but does not authorize them to thereafter compel him to repair or keep it in repair, the power as against the lot-owner is exhausted when they have compelled him to grade and pave or plank, and it will thereafter be the duty of the town to keep it in repair.

As is well said in the work on Roads and Streets from which we have heretofore quoted: "The right to levy a special assessment is purely statutory and in derogation of common right, whereas, making public improvements demanded by the public good, and to be paid for out of the public treasury, is the exercise of a corporate function that may well be implied from the general words of the act of incorporation." Elliott Roads and Streets, 343.

Under the statute above referred to, with reference to sidewalks, nothing is a necessary preliminary to action by the board but their opinion that public convenience requires it. They are unrestricted in determining the grade, the material of which it shall be constructed, or its width. While a petition is necessary to authorize them to grade and pave, or gravel or macadamize a street, so as to charge the cost of the improvement on the abutter, the board is unrestricted in determining the grade, the width to which it shall be improved, and in otherwise adopting specifications for the work.

In this case the board had determined that public convenience required the grading and paving of the walk. They had required that it be graded to the width of eight feet, and that four feet of the walk thus graded should be paved. If they had decided that public convenience only required the grading of four feet instead of eight, there would have been

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no ground for interference by the courts. That was a matter which the Legislature has left solely to their discretion, and we think that when they have once decided that public convenience requires the grading and paving of eight feet, and it has been done accordingly, they are not thereby precluded from afterwards deciding that the walk is wider than the public needs require, and causing it to be narrowed to meet their changed views.

In the case at bar the sidewalk had been graded to the width of eight feet in obedience to the order of the board, and four feet of the graded space had been paved. What part of the graded space was covered by the paving does not appear from the finding. Whether in the outer, the inner, or the central part, the court does not say; it is, however, not material. The land in question formed a part of Branson street, and the board of trustees had the same power to determine the width of the sidewalk at that point that they had to determine the width of any other sidewalk on any other street, and in the absence of any finding showing such abuse of the discretion with which the law has clothed them as would work great and irreparable injury to the appellees, they should not have been enjoined. If the effect of the work would be to cut off or destroy appellees' right of ingress or egress, they would doubtless be entitled to enjoin the board from doing it, but no such case is presented.

The record presents another question which is, we think, fatal to appellees' contention. To entitle them to an injunction it was necessary for them to plead and prove facts showing that the injunction was necessary to prevent the infliction of great and irreparable injury. The complaint does contain averments which, we think, are probably sufficient, but no fact is found by the court covering this averment. The court simply finds that the construction of the work as proposed would involve the taking up and removal of a strip of the sidewalk "six inches wide at the north end, and regularly increasing in width to thirty inches wide at the

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south end thereof, and that to take up and remove the part of said walk, as proposed, will leave but five and one-half feet of walk in front of the south end of said hotel for a sidewalk, and seyen and one-half feet at the north end." What effect, if any, this will have upon the hotel is not shown. The walk remaining may be of ample width. The finding indicates nothing to the contrary. Only four feet in width of the walk was paved. The remaining portion was probably left to be sodded for ornament. It may be that the paved portion will all remain and only the æsthetic sense be offended by the removal of a portion of the ornamental part of the walk. Access to the premises may be rendered easier instead of more difficult. Upon the facts found it certainly can not be stated as a legal proposition that the walk thus left will not be sufficient, or that the proposed action of the board will work irreparable injury to appellees. The facts found were insufficient to entitle appellees to relief by injunction.

Judgment reversed, with instructions to the court below to restate its conclusions of law in accordance with this opinion and to render judgment accordingly.

Filed Jan. 31, 1891.

No. 14,513.

THE BALTIMORE AND OHIO AND CHICAGO RAILROAD COMPANY v. WALBORN, ADMINISTRATOR.

RAILROAD.—*Injuries to Travellers at Public Crossing.—Failure to Give Statutory Signals.—Contributory Negligence.*—Where those in charge of a train approach a railroad crossing without giving the statutory signals, they are guilty of such negligence as renders the company liable to one who, without concurring negligence, is injured while attempting to cross the track.

SAME.—*Negligence.—When Question of Law and when of Fact.*—Where the

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139	375
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148	63
152	453
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facts are undisputed, and where but one inference can be drawn from the undisputed facts, the question of negligence is one of law; but where more than one inference may be reasonably drawn from the facts, the question is one of fact for the jury, under proper instructions from the court. For a state of facts where more than one inference might be drawn, and where, therefore, the question of negligence was one of fact for the jury, see opinion.

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164	373
127	142
171	597

From the Allen Circuit Court.

J. H. Collins and *B. B. Kingsbury*, for appellant.

W. L. Penfield, for appellee.

COFFEY, J.—This was an action by the appellee, as administrator of the estate of Andrew Bolander, deceased, against the appellant, to recover damages for an injury resulting in the death of the said Bolander.

The second paragraph of the complaint, upon which the cause was tried, alleges, substantially, that, on August 9th, 1887, the appellant was, and still is, running and operating a railroad running through the town of Garrett, in this State; that during all of said time there extended through the central part of said town and public street, running north and south, which street was intersected by the right of way of the defendant and its tracks, and which right of way and tracks ran east and west through the central portion of said town, and all of which were within the corporate limits of said town; that on said day the decedent was driving north along said street with a span of horses and wagon thereto attached, and while he was thus driving along said street and onto and upon said crossing, and was attempting to drive and pass over said crossing, he was, without any fault on his part, run against and over by an engine and car of the defendant thereto attached, solely through and by the negligence of the defendant; that the defendant, by its servants, who were then operating said engine and car as aforesaid, negligently failed and omitted to give any warning or signal of the approach of said engine and car towards the crossing, by the sounding of a whistle or the ringing of a bell, or by any watch-

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man or flagman, or in any other manner, and had negligently failed to provide any such watchman or flagman or gate at such crossing, although it was frequently passed over by the travelling public ; that although said decedent, as he approached and entered upon said crossing, exercised all due and proper care on his part, and looked and listened to see or hear any train that might be approaching, yet being unable to see or hear any train or engine in motion on account of the obstruction of his view by cars and trains of cars then standing on said track, and there being no signal or warning of any kind of the movement of said switch engine and car, he was, without any negligence on his part, and solely by and through the said negligence of the defendant, run upon and over by said car and switch engine, and was by said collision so bruised, mangled, crushed and mortally wounded that from said wounds and injuries he, within a few days thereafter, died, to wit, on the — day of August, 1887 ; that said collision, wounding and death of the decedent were caused solely by the aforesaid negligence of the defendant, and without any fault on his part ; that said decedent was, at the date of said collision, forty-three years old, was of sound constitution, healthy, industrious and frugal, and by his toil and exertions supported his family in comfort ; that he left surviving him his widow, Elizabeth Bolander, and four children, to wit, Frank, Emma, Lettie and Jeremiah, aged respectively, 22, 18, 16 and 15 years ; that said widow and children depended solely upon said decedent for their support, nurture, education and maintenance, and this action is prosecuted solely for their benefit ; that at the time of said collision said decedent was engaged in business in which he was capable of earning an income of \$1,500 per year ; that by reason of the premises said widow and children and the plaintiff had been damaged in the sum of \$10,000, for which the plaintiff demands judgment.

To this complaint the appellant filed an answer consisting of the general denial.

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Upon a trial the jury returned a general verdict for the appellee, upon which the court, over a motion for a new trial, rendered judgment.

Under the repeated rulings of this court to the effect that we will not undertake to weigh the evidence in a cause, every material fact necessary to make out the appellee's case which the evidence tends to establish must be taken as true, as it was so found by the jury. Under this rule the material facts in the case are, substantially, as follows:

The injury for which this suit was prosecuted occurred in the town of Garrett on the 1st day of August, 1887. At the point where it occurred the appellant has six railroad tracks running east and west parallel with each other. The most southern rail and the most northern rail of said tracks are about sixty-five feet apart. Randolph street, in the town of Garrett, which is eighty feet wide, runs north and south and crosses the six tracks of the appellant at the point where the injury occurred. Quincy street runs east and west at a distance of about three hundred and twenty feet south of the point where Randolph street crosses the appellant's tracks. Both sides of Randolph street, south of Quincy, are occupied with business buildings for a distance of two or three blocks south of Quincy street; and by reason of that fact the view of a person travelling north on Randolph is shut off both from the east and west. Near the west side of Randolph street a large round-house and machine shops and other large buildings are situated. A board fence, six or seven feet high, completely enclosed the grounds belonging to the appellant north of Quincy street, west of Randolph street and of defendant's tracks, except a small space near the west end of the fence. The fence approaches within fifteen feet of the most southerly of the appellant's tracks. At the time of the injury the third and fourth tracks from the south were occupied with long trains of freight cars, which were standing still, and were cut into

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two sections at the crossing, leaving a passage way between them of from eighteen to twenty-five feet, the two sections west of the crossing occupying the tracks upon which they stood to the round-house and machine shops, which stood on the south side of the tracks. The yard-office and other buildings stand near the northeast corner of the land enclosed by the fence above referred to, so that it was impossible for persons travelling on Randolph street north towards the crossing to see trains of cars moving along the northerly track eastward to the point where Randolph street crosses the tracks. On the south side of the tracks, and east of Randolph street, stands the passenger depot and adjacent building, one hundred and fifty feet long, the west end of which approaches within about seventy feet of Randolph street, the building being from ten to fourteen feet south of the most southerly track. On the north side of the tracks stands the freight-house within eight to fifteen feet of the most northerly track and within twenty-eight feet of the east side of Randolph street.

On the morning of the 1st day of August, 1887, about 8 o'clock, the deceased approached the crossing from the south on Randolph street, in a milk wagon, with the curtains rolled up on either side so as not to obstruct his view or hearing. He was a man of good hearing and average sight. While he was driving north on Randolph street towards the crossing, at a point one hundred feet south, he drove his team at a walk, the team continuing to walk until it entered upon the first or second track from the south. The team was kind, gentle and well-broken, and was under his control. Just before entering upon the tracks at the crossing, and as he entered thereon, he looked both east and west along the tracks to see and listened to ascertain whether he could hear any trains approaching, and did not either see or hear any train or engine in motion. There was no sound of bell or whistle, or any other noise indicating the approach of an engine or train. A dray was driven across the tracks from

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one to three minutes ahead of him. After he drove upon the crossing he continued to look east and west for approaching trains or engines. About the time his horses reached the sixth track in passing from the south, an engine and flat-car appeared in close proximity, running at the rate of about eight miles an hour, without escaping steam or ringing bell. As he passed between the freight cars above mentioned, some men on the opposite side of the tracks, seeing the approaching engine and flat-car, and the danger of the deceased, began to halloo and motion him to stop, but he, supposing the danger to proceed from the freight cars, started his horses in a brisk trot. He could not see the engine until he was on the fourth track. When his team saw the approaching engine it became frightened and unmanageable. He exercised his utmost effort to stop his team, but without success. Finding that he was unable to manage his team he urged it forward in order to cross in time to escape a collision, but was struck by the moving engine and flat-car, receiving injuries from which he died. From the time the engine started towards the crossing until after the collision occurred no whistle was sounded nor was the bell rung. Before his death Bolander was in the habit of passing over this crossing from two to three times a day, and was well acquainted therewith.

There is no question made in the case as to the negligence of those in charge of the engine which struck and caused the death of Bolander.

In approaching the crossing without ringing the bell, as required by the statute upon the subject, they were guilty of such negligence as rendered the company liable for the injury of which complaint is made, provided it occurred without the fault or negligence of the deceased. *Pittsburgh, etc., R. W. Co. v. Martin*, 82 Ind. 476; *Chicago, etc., R. R. Co. v. Boggs*, 101 Ind. 522; *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31.

The only remaining inquiry arising upon these facts, therefore, relates to the question as to whether they show such

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contributory negligence on the part of the deceased as precludes a recovery on account of the injury resulting in his death. Ordinarily negligence is a mixed question of law and fact, but it has often been held by this and other courts, that, generally, where the facts are undisputed, the question of negligence becomes one of law. This rule prevails where but one inference is to be drawn from the undisputed facts, and where the inferences can lead to but one result. Many cases illustrating this rule are found in the reported cases of this court. For instance, the law fixes the degree of care and duty to be exercised by a person about to enter upon a railroad crossing. It is his duty, when approaching a point upon the highway, where a railway track is crossed upon the same level, to proceed with caution, and if he attempts to cross the track, either on foot or in a vehicle, he must, in so doing, exercise what the law regards as ordinary care under the circumstances. He must assume that there is danger, and act with ordinary prudence and circumspection upon that assumption. In attempting to cross he must listen for signals, notice signs put up as warnings and look attentively up and down the track. *Ohio, etc., R. W. Co. v. Hill*, 117 Ind. 56.

As illustrating the rule that where but one inference can be drawn from the undisputed facts, and where the inferences to be drawn can lead to but one result, the question of negligence is one of law, are the cases which hold that a party approaching a railroad crossing under given circumstances can not recover for injuries unless he looks and listens for approaching trains. *Cincinnati, etc., R. R. Co. v. Butler*, 103 Ind. 31; *Cincinnati, etc., R. W. Co. v. Howard*, 124 Ind. 280; *Lake Shore, etc., R. W. Co. v. Frantz*, 127 Pa. St. 297; *Aiken v. Pennsylvania R. R. Co.*, 130 Pa. St. 380.

In this class of cases the court adjudges, as a matter of law, that the party injured has been guilty of such contributory negligence as precludes a recovery. Another large

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class of cases further illustrating the rule is where the courts hold that under the given state of facts the party injured was not guilty of negligence, or that the railroad company, under the undisputed facts, was not negligent. The cases of this class are too numerous to require special mention.

Between these two classes, one holding that the court will adjudge negligence from a given state of facts, and the other holding that the court will adjudge that there was no negligence from another and different given state of facts, is another class, which consists of a state of facts from which different conclusions may be drawn, and from which different deductions and results may be had.

This class of cases belongs to the jury, under proper instructions from the court, and the court will not undertake to say, as a matter of law, that any given state of facts belonging to this class constitutes negligence. The cases illustrating the rule applicable to this class of facts are numerous. One of the cases upon this subject is *Railroad Co. v. Stout*, 17 Wallace, 657. In that case Justice HUNT, who delivered the opinion of the court, in speaking of the rule last above mentioned, said: "Upon the facts proven in such cases, it is a matter of judgment and discretion, of sound inference, what is the deduction to be drawn from the undisputed facts. Certain facts we may suppose to be established from which one sensible, impartial man would infer that proper care had not been used, and that negligence existed; another man equally sensible and equally impartial would infer that proper care had been used, and that there was no negligence. It is this class of cases and those akin to it that the law commits to the decision of a jury. Twelve men of the average of the community, comprising men of education and men of little education, men of learning and men whose learning consists only in what they have themselves seen and heard, the merchant, the mechanic, the farmer, the laborer; these sit together, consult, apply their separate experience of the affairs of life to the facts proven and draw a unanimous con-

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clusion. This average judgment thus given it is the great effort of the law to obtain. It is assumed that twelve men know more of the common affairs of life than does one man, that they can draw wiser and safer conclusions from admitted facts thus occurring than can a single judge."

In the case of *Ohio, etc., R. W. Co. v. Collarn*, 73 Ind. 261, the language above quoted is set out and approved by this court. As further illustrating this latter rule see *Nordyke & Marmon Co. v. Van Sant*, 99 Ind. 188; *Pinnell v. Stringer*, 59 Ind. 555; *Ruff v. Ruff*, 85 Ind. 431; *Bethell v. Bethell*, 92 Ind. 318; *Lake Shore, etc., R. W. Co. v. Foster*, 104 Ind. 293; *North British, etc., Co. v. Crutchfield*, 108 Ind. 518; *Palmer v. Chicago, etc., R. R. Co.*, 112 Ind. 250; *Wabash, etc., R. W. Co. v. Locke*, 112 Ind. 404; *Gaynor v. Old Colony, etc., R. W. Co.*, 100 Mass. 208; *Vinton v. Schwab*, 32 Vt. 612; *Chicago, etc., R. R. Co. v. Boggs, supra*; *Salter v. Utica R. R. Co.*, 88 N. Y. 43; *French v. Taunton Branch R. R. Co.*, 116 Mass. 537; *Bonnell v. Delaware, etc., R. R. Co.*, 39 N. J. 189; *Kelley v. St. Paul, etc., R. W. Co.*, 29 Minn. 1; *Louisville, etc., R. R. Co. v. Crunk*, 119 Ind. 542.

The case now before us belongs to the intermediate class above named. We are asked to adjudge, as a matter of law under the facts above set forth, that the deceased was guilty of such negligence on his part as precludes the administrator in this case from recovering against the appellant for the injury which resulted in his death. This we can not do. The question as to whether he was or was not guilty of negligence under the facts and circumstances above detailed was, in our opinion, a question for the jury under proper instruction from the court.

We have carefully examined the instructions given by the court and find no error therein. They stated the law of the case to the jury correctly. Of the instructions asked and refused those which state the law correctly are, we think, embraced in those given by the court.

Some complaint is made as to the action of the court in

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admitting certain evidence, but after a careful consideration of the question presented we do not think the court erred in the matter of which complaint is made. *Smith v. State*, 28 Ind. 321; *Cincinnati, etc., R. R. Co. v. McDougal*, 108 Ind. 179.

After a careful examination of all the questions presented by the record we have found no error therein for which the judgment should be reversed.

Judgment affirmed.

Filed Jan. 14, 1891; petition for a rehearing overruled March 19, 1891.

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HANCH v. RIPLEY.

LIENS.—*Agister's Lien.—Prior Recorded Mortgage.*—The lien created by statute (section 5292, R. S. 1881) in favor of an agister is subordinate to the lien of a prior recorded mortgage.

From the Marion Superior Court.

A. C. Ayres, E. A. Brown and L. M. Harvey, for appellant.

H. J. Everett, for appellee.

BERKSHIRE, J.—The complaint contains two paragraphs, but as the judgment rests upon the first we need not notice the second.

The appellee was the plaintiff in the trial court and alleges that he was the owner, by virtue of a chattel mortgage, which was duly recorded, of two sorrel horses, and that the appellant wrongfully took possession of said horses, disposed of them and converted the proceeds thereof to his own use. The case was put at issue and tried, and a judgment rendered for the appellee. The facts presented by the record, so far as we need refer thereto, are as follows:

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A Mrs. Ainsworth was the owner of the horses, together with some other property ; she executed a chattel mortgage on the property to secure a note executed by her to the appellee for the sum of \$500.

The mortgage was duly recorded, and by its terms the mortgagor was to retain possession of the property until maturity of the note, and in case of default in payment of the debt at maturity the appellee, as such mortgagee, was entitled to the possession of the property. After the execution of the mortgage, the husband of the mortgagor contracted with the appellant, an agister, to feed and care for said horses, and placed them in his possession for that purpose ; afterwards the appellant, not having been paid for services and expense in keeping and caring for said horses, advertised the same for sale at public auction and became the purchaser for the amount which he claimed to be due to him ; and thereafter he sold and disposed of said horses to other parties.

There is some question raised as to whether or not there was a redemption from said sale by virtue of an arrangement made between the husband of Mrs. Ainsworth and the appellant, but in view of the conclusions to which we have arrived whether there was a redemption or not does not become material.

The point is also made that under the evidence and the issues in the case, it became a question of fact for the jury whether or not the horses were delivered to the appellant to feed and care for, with the knowledge and consent of the appellee ; but as there is an entire failure of evidence as to any such knowledge or consent no such question is presented for our consideration. The one single question which the record presents is, who had the superior lien, the mortgagee or the agister ?

We have the following statute in regard to the recording of chattel mortgages :

“Section 4913. No assignment of goods, by way of mort-

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gage, shall be valid against any other person than the parties thereto, when such goods are not delivered to the mortgagee or assignee and retained by him, unless such assignment or mortgage shall be acknowledged, as provided in case of deeds of conveyance, and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof."

At common law an agister had no lien. *Grinnell v. Cook*, 3 Hill, 485 (38 Am. Dec. 663); *Bissell v. Pearce*, 28 N. Y. 252; 13 Am. & Eng. Encyc. of Law, 943, and citations in notes 2 and 3.

Nearly all of the States have statutes recognizing the right of livery stable keepers and agisters to a lien on horses and other animals for their keep, and necessarily the extent and character of the lien depend upon the construction to be given to the statute creating it. Our statute is as follows:

"Section 5292. The keepers of livery stables and all others engaged in feeding horses, cattle, and hogs, and other live stock shall have a lien upon such property for the feed and care bestowed by them upon the same, and shall have the same rights and remedies as are provided for those persons heretofore having, by law, such lien in the act to which this is supplemental."

It is not necessary to call attention to the original act, as it will throw no light upon the question under consideration. The language employed in the statute is general in its character. It does not seem to have been the intention of the Legislature to do more than to create a lien in favor of the classes of persons named; and not having expressed any intention of giving to these persons superiority over other lien-holders, we think it is but fair to presume that it was the intention of the Legislature to place them on a common plane with other lien-holders, the first in the order of time having superiority.

As the agister's lien depends alone upon the statute, it can have no greater force than the statute gives it, and as the

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Legislature has, as we have said, manifested no intention of giving to it superiority over other liens, it can have none. And we may say in this connection that we can imagine no good reason why superiority should exist in favor of an agister over other lien-holders. The lien of each rests upon a valuable consideration arising out of contract, express or implied, unless it may be the general lien which the law creates when an execution is in the hands of a ministerial officer, the effect of which, as against an agister's lien, we are not now called upon to consider.

The appellee loaned his money in good faith and took a note and a chattel mortgage to secure the same ; he, within the time allowed by law, had his mortgage recorded ; the appellant, with notice (for he was bound to take notice) of the appellee's mortgage, under a contract with one not the owner of the property, but at most her agent, furnished his feed and services (which was but money), whereby the mortgagor became indebted to him, and to secure which indebtedness the law created a lien. Not only was the record of the mortgage notice to the appellant of the appellee's lien, but notice also (if that were important) as to whom the property belonged. Had the appellant had actual notice of the appellee's mortgage, and in the face of such notice had he taken the property to keep, what plausibility would there be in his claim to superiority of lien ? What equity would there be in such a claim ? None whatever.

With the record before him (and constructively it was before him), the notice came with the same force to the appellant as if he had had actual notice, and was as effectual to him as an agister as to other classes of junior lien-holders. But if it were necessary we might add further, that one of the conditions in the appellee's mortgage was that the mortgagor should not remove the pledged property from where it was at the time the mortgage was executed, except by the consent of the mortgagee, and of this the appellant had notice.

We concede that there is some conflict of authority as to

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the construction to be placed upon statutes creating liens in favor of agisters, as to whether these liens should have superiority over other specific liens senior thereto. The decisions, however, in some of the cases which seem to be adverse to our conclusion were influenced by special circumstances. See *Vose v. Whitney*, 7 Mont. 385; *Smith v. Stevens*, 36 Minn. 303.

The last case turned upon the express language of the statute of Minnesota, the statute expressly providing that the keeping at the request of the *legal possessor* shall be sufficient to create the lien; the court holding that the mortgagee took his mortgage with a full knowledge that under the law the mortgagor might create an agister's lien against it superior to his mortgage, and hence was bound thereby. See *Hammond v. Danielson*, 126 Mass. 294.

But the weight of authority and, as we think, the better reasoned cases, are in accord with the conclusion to which we have arrived. See *McGhee v. Edwards*, 87 Tenn. 506; *Jackson v. Kasseall*, 30 Hun, 231; *Bissell v. Pearce, supra*; *Charles v. Neigelsen*, 15 Ill. App. 17; *Sargent v. Usher*, 55 N. H. 287; *State Bank v. Lowe*, 22 Neb. 68; *Easter v. Goyne*, 51 Ark. 222; Jones Liens, sections 691-3; Jones Mortgages, section 472.

The lien which exists in favor of one making repairs upon a vessel rests upon other principles than does a statutory lien in favor of an agister, and hence we do not think the authorities cited as to the effect of such liens are in point.

In *Easter v. Goyne, supra*, it is said: "The statute under consideration does not evince the intention to give preference to the statutory lien, and in the absence of a legislative intent to that effect, the courts have not, unless in exceptional instances, permitted the lien created by the statute to become paramount to a prior recorded mortgage. * * * In accordance with this rule it has been decided by this court that a mechanic's lien is subordinate to a prior recorded mortgage." And so it has been held by this court as to a

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mechanic's lien. *McCrisaken v. Osweiler*, 70 Ind. 131; *Close v. Hunt*, 8 Blackf. 254; *Troth v. Hunt*, 8 Blackf. 580.

The case of *Case v. Allin*, 21 Kan. 217, being, as we think, against the great weight of authority, and in principle against our own cases cited above, we can not give to it the weight that it would otherwise be entitled to receive.

We find no error in the record.

Judgment affirmed, with costs.

Filed Dec. 16, 1890; petition for a rehearing overruled Mar. 20, 1891.

127	156
130	5
127	156
131	380
127	156
138	311
127	156
156	25
127	156
158	222

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No. 15,835.

THE CHICAGO, ST. LOUIS AND PITTSBURGH RAILROAD COMPANY *ET AL.* v. EISERT.

STREET.—*Obstruction of.*—*Injunction.*—A private individual may maintain an action because of an obstruction of a public street, where such obstruction peculiarly affects him, although it does not affect the general public.

SAME.—*Injunction.*—*Irreparable Injury.*—If the damages are irreparable, such as affecting the free use of a residence, or an abutting lot, cutting off ingress or egress thereto, and endangering the property, life and health of persons residing thereon, an injunction will be granted to prevent the obstruction.

INJUNCTION.—*Complaint as Evidence.*—A verified complaint, in an action for an injunction, submitted to the court on the trial as evidence in the case, will be treated as any other document put in evidence.

RAILROAD.—*Tracks Laid in Street.*—*Double Tracks.*—“*Line of Railroad.*”—A city granted a right of way to a railroad company to lay its track in a street, upon condition that it grade and gravel such street, and make and maintain all necessary culverts and crossings, the grade to be established so as not to materially interfere with the convenience of the public in crossing the track where other streets intersected such street. Another condition was that the “line of the railroad” should “be located so as not to approach the sidewalk-curbstone nearer than fifteen feet.” The company also prosecuted proceedings of appropriation, and had the damages sustained by all the adjacent land-owners assessed. The use to be made of the property was in no way limited.

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Held, that the company had a right to lay one or more tracks in the street; that the words, "line of the railroad," as used in the ordinance, had reference to the outer rail of the track, and so long as there was a clear fifteen feet between such outer rail and the curbstone, and the track was not raised above the established grade of the street, an abutting landowner could not object.

From the Cass Circuit Court.

N. O. Ross and *G. E. Ross*, for appellants.

D. H. Chase and *M. D. Fansler*, for appellee.

OLDS, C. J.—This case was an application by the appellee for a restraining order prohibiting the appellant from constructing a second or additional track on and along Canal street, in the city of Logansport, in front of appellee's property. The court heard the application and granted the temporary injunction.

Appellant moved to modify the order granting the injunction, which was overruled and exceptions reserved.

This appeal is prosecuted and the granting of the injunction and the overruling of the motion to modify the order are assigned as error.

The railroad was originally constructed by the Toledo, Logansport and Burlington Railroad Company. In 1859 the common council of the city of Logansport, by a proper ordinance, granted to said T., L. & B. R. R. Co. the right to construct its railroad along and upon said Canal street, stipulating in the grant that said company should grade and gravel the street, make and maintain necessary culverts and crossings in good and substantial manner, to be gravelled the whole width of said street from gutter to gutter, and the grade to be established so as not to interfere materially with the convenience of the public in crossing said railroad where other streets cross or intersect Canal street. Also, that "between McKeen street and the alley between Fourth and Fifth streets, the line of the railroad shall be located so as not to approach the sidewalk curb-stone nearer than fifteen feet." Said railroad company also prosecuted proceedings of ap-

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propriation, and had the damages sustained by adjacent land owners assessed, including the damages to the lot now owned by the appellee. By these proceedings it was sought to appropriate whatever was authorized to be appropriated for such purposes under the statute. The use to be made of the property was in no way limited.

The appellee is the owner of a lot adjacent to and fronting on said Canal street, in the city of Logansport, upon which is situated a frame residence in which she resides. The appellee brings this suit alleging, in her complaint, her ownership of the lot, and that her dwelling-house in which she lives is situated upon it; that the only way of ingress and egress to and from said lot and her residence is by way of and across said Canal street; that the appellant, upon Sunday, August 17, 1890, brought a large number of its employees from other parts of its road to the point in front of appellee's lot and residence and commenced building a second or additional track along and upon said Canal street between the center of the street and the line of her lot, the south rail of said track being within eight feet of the north line of plaintiff's sidewalk; that said appellant placed about one hundred ties in line along said street at a distance of about eighteen inches apart, and placed upon them rails in order to construct a track on which to run its cars and locomotives; that appellant has at least twenty cars loaded with gravel standing upon such temporary track, a portion of them standing in front of appellee's premises ready for the gravel to be unloaded and used in building said track; that the appellant is constructing said track at a height of fifteen inches above the grade on such street; that the construction of such track is without any authority of law and being done without having first had appellee's damages to the lot adjacent to such street assessed and paid; and the construction, of the same as contemplated, and as it is being constructed will totally obstruct said Canal street and deprive the appellee of ingress and egress to and from her said lot and res-

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idence by means of wheeled vehicles, endangers her residence, which is of timber, from fire escaping from appellant's locomotives; makes the crossing of the street dangerous to the life and limbs of plaintiff's family and those visiting or having business with her at her residence, and will cause the water to overflow her sidewalk and premises, etc. The complaint is verified.

The application was submitted to the court on the verified complaint, the ordinance of the common council, the record of the appropriation proceedings and an admission that the appellant had succeeded to all the rights of the former company, the T., L. & B. R. R. Co.; also the affidavit of Charles M. Bennett, division superintendent of the appellant, controverting the facts as to the manner of constructing the track.

Upon this evidence the court passed upon the case and granted a temporary restraining order restraining the appellant, its servants and employees, as per the language used in the order, "from placing any further rails or other obstructions on Canal street in the city of Logansport, Indiana, in front of plaintiff's premises, mentioned and described in plaintiff's complaint, and are restrained from unloading gravel or any gravel or earth in front of plaintiff's said premises, or from ballasting the temporary track now in front of plaintiff's premises, or from doing acts to the injury of the plaintiff in front of her said premises, or in any manner improving or adding to the track in front of plaintiff's premises on Canal street, until the further order of the court."

The complaint in this case stated a good cause of action, entitling the appellee to an injunction.

The license was first granted by the city for the use of the street for railroad purposes, and then followed the appropriation proceedings. These two proceedings fixed the rights of the company, and by them the right of the company to the use of the street was limited so as not to allow the line

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of the track to be laid within fifteen feet of the curb-stone to the sidewalk along said street, and the tracks to be so laid as not to unnecessarily obstruct the travel upon and use of the street.

The complaint alleges that appellant is proceeding to put down a track within eight feet of the curb-stone, and to raise the grade at least fifteen inches above the established grade of the street.

These allegations show that the appellant is about putting down a track at a place in the street, and to make a change in the grade, which it has no right to do. It charges the appellant with doing and attempting to do an unlawful act, and that the doing of such act, and laying the track at the place and in the manner in which it is being done; will obstruct the street and entirely cut off the appellee's access to her lot by wheeled vehicles, endanger her property by reason of fire escaping from the engines upon the track, and the lives of the members of her family and others visiting her house; that the height of the grade will obstruct the natural flow of the water and turn it upon and overflow her lot; that the only means of ingress and egress to and from her lot is by way of said Canal street.

The complaint, we think, is sufficient to entitle the appellee to an injunction. It shows that the appellee sustains a peculiar damage not suffered by the public in general. Her only means of ingress and egress to and from her lot is through Canal street in front of her lot at the point where the track is being constructed; that the track is in such close proximity to her house as to endanger it by sparks emitted from locomotives; that it will turn the surface water upon and overflow her lot. These are things which peculiarly affect the appellee, but do not affect the general public. In such a case the law is well settled in this State that the individual is entitled to special damages. *Fosson v. Landry*, 123 Ind. 136. Where the damages are, as shown to be by the allegations of the complaint in this case, of an irrepara-

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ble character, affecting the free use of the residence and home of the party, cutting off ingress and egress, endangering the property and the life and health of the family residing therein, the party is entitled to an injunction prohibiting the doing of the unlawful act affecting the rights of such person.

The complaint being sufficient, and having been submitted to the court for decision on the verified complaint, the affidavit of the superintendent, together with the ordinance of the city council and record of the appropriation proceedings, the verified complaint afforded evidence from which the court may have found the facts entitling the appellee to an injunction.

The appellant moved the court to so modify the order and judgment granting the injunction as to permit the appellant to complete its second track through Canal street in front of the appellee's property, described in her complaint, by so placing such track that the rail thereof on the south side shall not approach the sidewalk in front of appellee's said property nearer than fifteen feet, and that it shall be placed at the grade of said street, and shall be so constructed as not to impede or interfere with the travel on said street unnecessarily. This motion the court overruled, appellant excepted, and the ruling is assigned as error.

As we have stated, the ordinance of the city granting the right to use the street for railroad purposes, and the record of the appropriation proceedings, were in evidence. The city ordinance and the appropriation gave to the railroad company full authority to use so much of the street as was granted to them to be occupied for railroad purposes for the use of the company. Upon such portion, if the business of the road required it, the company had a right to construct one or more additional tracks if there was sufficient room to do so. The city ordinance did not limit its right to the construction of but one track, and the damages assessed

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under the appropriation proceedings covered all damages growing out of the necessary and legitimate use of such portion of such street for railroad purposes, whether it was occupied by one or more tracks. *White v. Chicago, etc., R. R. Co.*, 122 Ind. 317.

The appellee had no right to a restraining order preventing the construction of a second track in accordance with the right granted by the city ordinance, but it is contended by counsel for appellee that appellants were not entitled to have the order modified as asked, for the reason that appellants moved to have it so modified as to allow it to construct its track so that the south rail of the track should not approach within fifteen feet of the curb-stone of the sidewalk; whereas, by the city ordinance, it is provided that the "line of the railroad" should not approach nearer than fifteen feet of the curb-stone, and that by the "line of the railroad" is meant the extreme limit, including the ties and grade; that the dirt and embankment on which the ties rest constitute a part of the railroad, and that by the ordinance the extreme outside of the road can not approach nearer than fifteen feet of the curb-stone.

We can not agree with this construction. Such interpretation must be given to the words "line of the railroad" as will fairly express the intention of the common council passing the ordinance. The word "line," as applicable to the line of a public highway, or running stream, is usually construed to mean the center or thread of the stream or highway, but it is evident that such a meaning was not intended in this case. To place such a construction on the language and hold that it meant the center of that portion occupied by the railroad company would give the company the right to locate its tracks up to the curb-stone, and the same distance in the opposite direction. Nor do we think it was intended that it should apply to the extreme outer edge, as in some places the grade or the bed of the road would be much wider; indeed, if there was any great amount of grad-

The Chicago, St. Louis and Pittsburgh Railroad Company *et al.* v. Eisert.

ing, cutting and filling required along the street, the extreme outer edges of any considerable grade would extend beyond the limits thus allowed, without a wall or any precipitous embankment.

The ordinance requires the railroad company to grade and gravel the street the entire width from sidewalk to sidewalk, or from gutter to gutter; and this being done the only portion of the track necessarily or properly rising above the surface of the grade is the rails, and they constitute the track or railroad in one sense. In a broader sense a railroad includes all the land, works, buildings and machinery required for the support and use of the road or way with its rails. See Worcester's definition of railroad.

We think the words "line of the railroad," as used in the ordinance, has reference to the tracks, the rails upon which the cars run; that the line of tracks, or line of rails, should not approach nearer than fifteen feet of the curb-stone; that the ordinance granted permission to use the center of the street for railroad purposes, for the purposes of laying the tracks, and that it confined the right of the company to the use of the street by fixing the outside limit to which it had the right to lay the rails of its tracks, designating that the line of rails should not approach nearer than fifteen feet of the curb-stone, thereby preserving for the use of the public fifteen feet on each side of the tracks in addition to the sidewalk. This gives to the words a reasonable construction, and one that is fair to the railroad company, the adjacent property-owner and the general public. The conclusion rendered in regard to the construction to be given to the ordinance and the rights of the parties, as hereinbefore stated, leads to a reversal of the judgment for the error of the court in overruling appellant's motion to modify the order granting the injunction. The order should have been modified as asked for by the appellant.

Judgment reversed, at costs of appellee, with instructions to the circuit court to sustain appellant's motion to modify

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the judgment, and for further proceedings in accordance with this opinion.

Filed Feb. 4, 1891.

127	164
130	24
130	32
127	164
154	571

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No. 14,687.

FANKBONER v. CORDER.

EASEMENT.—Owner of Servient Estate.—Proof of Disability.—While a right can not be acquired by prescription against one under disabilities, the person claiming the right is not required to aver and prove that the owner of the servient estate was not under disabilities. If disability is relied on as a defence it must be established by the party asserting it, as disability is not presumed.

SAME.—Ways.—Prescription.—Where there is a continuous and uninterrupted use of a private way over the land of another by an adjoining owner for more than twenty years, and the owner of the dominant estate during such time expends money in improving the way, and the owner of the servient estate marks its boundaries and fences it, a title to the way by prescription is established.

SAME.—Intersection of Private Way with Public Road.—Erection of Gate.—The owner of the servient estate has no right to erect a gate at the place where a private way acquired by prescription intersects a public road, where no gate was erected during the requisite term for acquiring the way.

SAME.—Purchaser of Servient Estate with Knowledge.—One who takes an estate upon which a servitude has been imposed, with knowledge of its existence, holds it subject to the same servitude and in the same manner as it was held by his grantor.

From the Grant Circuit Court.

G. W. Harvey, H. J. Paulus and S. Moore, for appellant.

McBRIDE, J.—This was a suit by the appellee against the appellant to restrain him from erecting a gate across the entrance to a private way, the right of which she claimed had been acquired by prescription.

The court, by request of appellant, made a special finding of the facts and stated its conclusions of law thereon. Ap-

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pellant excepted to the conclusions of law and assigns error thereon.

Appellant also assigns as error the overruling of his motion for a new trial. The motion for a new trial was based solely upon the insufficiency of the evidence to sustain the finding. We have read the evidence carefully and find it very conflicting. Appellee called a large number of witnesses, and their testimony tends strongly to sustain the finding. A number of witnesses called by appellant testify to the direct opposite on several material questions. It is very plainly a case where this court, under its uniform and long established practice, can not disturb the finding. The remaining question is the only one which we can consider.

The special finding is, so far as we need consider it, substantially as follows:

Appellee owns and resides upon a certain tract of land in Grant county, Indiana. Appellant owns and resides upon land adjacent thereto, the title to which he acquired in the year 1887. A public gravel road runs along the side of the appellant's land. The private way in question is fourteen feet wide, and runs from appellee's dwelling-house, where she and her family reside, across her said land and the land of appellant, and terminates at the said gravel road. It is fenced on both sides, and for more than thirty years has been used by appellee, and those under whom she claims, as a means of access to her said lands, and as a passage-way between said lands and said public gravel road. Such use had been continuous and unobstructed for more than twenty years before the commencement of the suit. One Knight, a former owner of appellant's land, recognized the existence of said way, and established its width by depositing in said gravel road two stones to indicate the east and west sides thereof respectively, and Robert Corder, husband of appellee, twenty-five years before the commencement of the suit, for the purpose of rendering ingress and egress to and from appellee's land more easy, improved said way by doing

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grading and graveling thereon of the value of \$60.50. It is further found that such use of said way had continued for thirty years before appellant became the owner of his said land. Also, that appellant knew, when he became the owner of said land, of the existence and use of said way. The gravel road in question is a highway, leading from Jonesboro, west, and intersecting the Marion and Liberty gravel road leading to Marion, the county-seat of the county.

One may acquire an easement in the lands of another by prescription. To establish the existence of such easement he must show a continuous, uninterrupted, adverse use, under claim of right, and with the knowledge and acquiescence of the owner of the land. By continuous and uninterrupted use is meant use not interrupted by the act of the owner of the land, or by voluntary abandonment by the party claiming the right. It is not necessary that the use should have been continuous in the person asserting the right. It will be sufficient if such use has been continuous in him and those under whom he claims. If there has been the use of an easement for twenty years, unexplained, it will be presumed to be under a claim of right, and adverse, and be sufficient to establish a title by prescription, and to authorize the presumption of a grant, unless contradicted or explained. Washb. Easements and Servitudes, 156, and cases cited.

While it is true, as claimed by appellant, a right can not be acquired by prescription against one under disabilities, the person claiming the right is not required to aver and prove that the owner of the servient estate was not under disabilities. If disability is relied on as a defence it must be established, like any other defence, by the party asserting it. There is in such a case no presumption of disability. In the absence of any testimony to the contrary, it will be presumed there was no disability. *Palmer v. Wright*, 58 Ind. 486.

In this case there was no finding that any owner of the servient estate had been under any disability, nor was there

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any evidence introduced tending to show that any disability existed.

Applying the foregoing general principles to the facts in this case, the conclusion is irresistible that appellee has acquired an easement in the way in controversy by prescription. The court finds that there was a continuous, uninterrupted use for more than twenty years. This, unexplained, raises a presumption that it was adverse and under claim of right. The only explanation afforded grows out of the fact that the claimant of the dominant estate during twenty-five years of such occupancy expended time and money in grading and otherwise improving the way. This, with the fact that the owner of the land over which the way passes, marked its boundaries with stones set in the highway, renders this presumption conclusive. The marking of the lines with stones, coupled with the fact that the owner of the land fenced the sides of the way, is sufficient to show knowledge of the use. Knowledge and acquiescence may be shown by direct testimony, or it may be inferred from the facts and circumstances shown. *Palmer v. Wright, supra.*

Although appellant only became the owner of the land in 1887, the finding shows the easement acquired before that time, and that he bought with knowledge of its existence. Whoever takes an estate upon which a servitude has been imposed holds it subject to the same servitude and in the same manner as it was held by his grantor. Washb. Easements and Servitudes, 7.

A conveyance by the owner of a servient estate does not affect the owner of the easement if the purchaser has notice of its existence. Washb. Easements and Servitudes, 11; *Ross v. Thompson*, 78 Ind. 90; *Robinson v. Thraikill*, 110 Ind. 117.

In the case of *Phillips v. Dressler*, 122 Ind. 414, this court held that the owner of the fee in land which was subject to the easement of a private way reserved, or granted by deed, might maintain a gate at the point where such private way

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intersects a public road. That case, unquestionably, states the law as applied to easements of that character. An examination of the cases cited will show that it is abundantly sustained by authority. The rule, as there given, is quoted from Goddard Easements (Bennett's ed.), 331, and on the same page of this work we find the rule applicable to the facts of this case, stated thus: "If the way has been gained by *prescription*, and no gates or bars have ever been erected during the requisite term, it would seem from the analogies of the law that none can afterwards be erected, since the extent of the use is the measure of the right." We fully approve the rule thus stated. The finding in this case shows the way to have been unobstructed for more than twenty years before the commencement of the suit.

The court below granted a perpetual injunction against the threatened obstruction of the way, and we see no reason why the judgment should be reversed.

Judgment affirmed, with costs.

Filed Feb. 5, 1891.

127 168
131 402

No. 14,739.

THE TOLEDO, ST. LOUIS AND KANSAS CITY RAILROAD
COMPANY v. LEVY ET AL.

CONTRACT.—*Parol Negotiations.*—*Merger.*—The rule that all parol negotiations are conclusively presumed to be merged in the written contract has no application to contracts made after the execution of the writing. Written contracts may be modified, changed or rescinded by parol at any time after their execution.

COMMON CARRIERS.—*Shipment of Freight.*—*Subsequent Parol Contract.*—*Evidence.*—In an action against a railroad company for the breach of a contract for the shipment of cattle, evidence of conversations between the plaintiffs and the agent of the defendant is admissible to prove that a

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written contract for transportation was abandoned, and that the cattle were shipped under a parol contract subsequently made.

From the Grant Circuit Court.

S. O. Bayless, for appellant.

G. W. Harvey, H. J. Paulus and A. De Wolf, for appellees.

COFFEY, J.—This was an action by the appellees against the appellant to recover damages arising out of an alleged breach of contract to transport cattle from the city of Marion, in this State, to the city of Buffalo, in the State of New York.

It is alleged in the complaint that in the month of July, 1888, the appellees were the owners of thirty-eight head of fat cattle, at Marion, Indiana, which they desired to ship to the city of Buffalo, in the State of New York, to be sold in the market on the 7th day of that month; that the appellant, through its agent, at the city of Marion, in order to induce the appellees to ship said cattle over its road, undertook and contracted with them that it would deliver, without damage or delay, all said cattle in the cattle market of said city of Buffalo, in time for the early morning market on the morning of the — day of July, 1888, which said early morning market would be not later than 8 o'clock A. M.; that in order to reach said city of Buffalo by rail, appellant was compelled to transfer its freight and cars to the Lake Shore Railroad, which runs through the city of Toledo, in the State of Ohio, over which said line appellant agreed to ship and deliver said cattle; that, pursuant to said contract, appellees did, on the 5th day of July, 1888, ship said stock over appellant's road, and that the appellant violated said contract in this, to wit: that at the said city of Toledo, the cars containing said stock were permitted, by the carelessness of appellant, and the carelessness of the said Lake Shore Railroad Company, to remain on the side-tracks and switches at Toledo for the period of seven hours during the

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— day of July ; that the heat of the sun was intense upon the cars containing said cattle, and that by reason of said heat one of said cattle died, and that by reason of said delay the cattle did not arrive in the city of Buffalo in time for the morning market for the — day of July, 1888 ; that, in order to sell said cattle, the appellees were compelled to and did accept therefor twenty cents less upon the hundred pounds than they would have received had said cattle been delivered at the time required by said contract ; that the steer which died as aforesaid was of the value of ninety dollars.

To this complaint the appellant filed an answer consisting of three paragraphs, the first being a general denial.

The second and third paragraphs of the answer aver that the cattle named in the complaint were shipped under a written contract between the appellant and appellees, setting out the contract under which it is averred the cattle were shipped.

The appellees, among other things, replied that the contract set out in the answer had, by mutual agreement between the parties, been rescinded at a time prior to the shipment of the cattle, and that they were shipped under the verbal agreement set up in the complaint.

A trial of the cause by a jury resulted in a verdict in favor of the appellees, upon which the court, over a motion for a new trial, rendered judgment. The jury, with their general verdict, also returned answers to special interrogatories.

It is contended by the appellant that the verdict of the jury is not supported by the evidence. The contention is that the evidence conclusively proves that the cattle named in the complaint were shipped under the written contract set out in the answer, and as the appellees have declared on a verbal contract they can not recover.

It is undoubtedly true that a party can not sue upon a parol contract and recover upon a written contract. He must recover upon the case made by his complaint. A complaint

The Toledo, St. Louis and Kansas City Railroad Company *v.* Levy *et al.*

can not be made elastic so as to bend to the changing views of counsel as the cause proceeds. It must proceed to the end upon the theory upon which it is constructed. *Mescall v. Tully*, 91 Ind. 96; *Johnston Harvester Co. v. Bartley*, 81 Ind. 406.

But in this case, as we have seen, a square issue was made by the pleadings in the cause, as to whether the shipment was made under the written contract set out in the appellant's answer, or whether it was made under a parol contract subsequently entered into between the parties.

The jury, in answer to special interrogatories, find that the shipment was not made under the contract set out in the answer, but that it was made under the parol agreement set up in the complaint. The evidence upon this issue is conflicting, but it can not be said that there is no evidence in the record tending to support the finding of the jury. Under the well known rule in this court we can not disturb the verdict of the jury on the evidence.

The rule that all parol negotiations are conclusively presumed to be merged in the written contract has no application to contracts made after the execution of the writing. Written contracts may be modified, changed or rescinded by parol at any time after their execution. *Billingsley v. Stratton*, 11 Ind. 396; *Ward v. Walton*, 4 Ind. 75; *Coyner v. Lynde*, 10 Ind. 282.

The court did not err in admitting in evidence conversations between the appellees and the agent of the appellant at a time subsequent to making the written contract averred in the answer.

Under the issues in the cause the appellees had the right to prove, if they could do so, that the written contract was abandoned, and that they shipped their cattle under a parol contract subsequently made. They could only prove this by detailing what was said between them and the agent of the appellant.

Woodward *v.* Davis.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed Feb. 5, 1891.

197 172
135 451

No. 14,660.

WOODWARD *v.* DAVIS.

SPECIAL VERDICT.—*Overpayments.—Action for Accounting.—Demand.*—The plaintiff, as appears by the special verdict, executed to the defendant a promissory note for one hundred and twenty dollars, and as collateral security gave him an order upon his employer. Payments were made on the note at various times, and the entire sum due upon it was paid before October 18th, 1887. On that day the appellant received upon one of the orders delivered to him as collateral security the sum of \$60.90. The verdict recites: “About the time the defendant received * * * said \$60.90 on the order the plaintiff demanded an accounting from the defendant, and at the same time demanded that the defendant surrender to him the note, and that the defendant pay to plaintiff the balance of the sum overpaid on the note, both of which demands the defendant refused, and retained, and yet retains, possession of the note and the money so last collected.”

Held, that plaintiff was entitled to judgment; that it appears that a sufficient demand was made, and that it was made after the collection of the order paid on October 18th, 1887.

From the Elkhart Circuit Court.

J. M. Vanfleet, for appellant.

H. C. Dodge, for appellee.

ELLIOTT, J.—The facts, as they appear in the special verdict, are, in substance, these: The appellee executed to the appellant a promissory note for one hundred and twenty dollars, and as collateral security gave him an order upon a railway company by whom the appellee was employed. Payments were made on the note at various times, and the entire sum due upon it was paid before October 18th, 1887. The

Woodward *v.* Davis.

appellant received upon one of the orders delivered to him as collateral security the sum of \$60.90 on the day named. "About the time," as the verdict recites, "the defendant received from the railway company said \$60.90 on the order, the plaintiff demanded an accounting from the defendant, and at the same time demanded that defendant surrender to him the note, and that the defendant pay to plaintiff the balance of the sum overpaid on the note, both of which demands the defendant refused, and retained, and yet retains, possession of the note and the money so last collected." The appellant owes the appellee the sum of \$48.36, for which he had not accounted when the action was brought.

The facts found entitled the appellee to judgment. A special verdict is not to be defeated by a strict interpretation, but a reasonable construction is to be given it, and the construction is to be put upon it as an entirety, and not in fragmentary parts. Taking the entire verdict into consideration, it appears with reasonable certainty that a demand was made after the collection of the money due upon the order paid to the appellant on the 18th day of October, 1887. It is clear, upon a fair reading of the paragraph of the verdict we have copied, that the demand was made after the collection of the order paid on the day named. The term "received," as here employed, denotes a past occurrence, and refers to what took place before the demand was made, for the words associated with it show that the demand was made after the note was overpaid. The word "about" is, as appellant's counsel say, of uncertain meaning, but one word does not control a sentence, for it is a familiar rule that associated words must be given due weight. We think that, as the demand was for money overpaid on the note and for an accounting, it was sufficient to complete the cause of action, inasmuch as it gave the defendant to understand that the plaintiff believed that the note had been overpaid, and that he claimed the remainder due him upon the ground that the money had been previously received. This clearly implies a past occurrence, and

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as a demand, although necessary in such a case as this, is somewhat of a technical feature of the right of action, no high degree of strictness was required in stating it.

Judgment affirmed.

Filed Feb. 4, 1891.

127 174
131 110
137 174
141 696

No. 14,255.

127 174
171 262

BOYD v. MURPHY ET AL.

STREET IMPROVEMENT.—*Defence to Precept.*—Upon an appeal from a precept, no question of fact can be tried which arose prior to the execution of the contract. Section 3165, R. S. 1881.

SAME.—*Letting Bids.*—The common council has the power to choose between bidders for street work, and when it has done so its decision is final.

SAME.—*Presumption.*—It will be presumed by the courts that the council, in letting a bid, acted in good faith and for the best interests of both the city and the property-holders, and that it exercised its discretionary power wisely.

SAME.—*Bid and Additional Contract.*—After bids are received, the council may let the contract to the highest bidder, upon condition that he perform extra street improvement, work not specified in the improvement ordinance and advertisement for bids, even though such extra work has never been ordered by the council, by any resolution or ordinance; and may assess abutting property according to the rate imposed upon it by such bid.

From the Hancock Circuit Court.

S. E. Urmston and J. A. New, for appellant.

C. G. Offutt, for appellees.

BERKSHIRE, C. J.—This is an appeal from a precept issued by order of the common council of the city of Greenfield to enforce the collection of an assessment in behalf of the appellees as contractors for street improvements.

The appellant demurred to the transcript filed as the complaint, but the court overruled the demurrer and he saved

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an exception. He then filed an answer in three paragraphs, the second paragraph being the general denial.

The appellees submitted demurrers to the first and third paragraphs, which were sustained by the court, and the appellant reserved exceptions.

The appellant then withdrew the second paragraph of his answer, and, refusing to answer further, the court rendered judgment against him as upon a default.

The errors assigned by the appellant may be stated as follows:

1. It was error to overrule the demurrer to the complaint.
2. The ruling of the court in sustaining the demurrer to the first paragraph of answer was erroneous.
3. The court erred in sustaining the demurrer to the third paragraph of answer.

We find no substantive fact alleged in the first paragraph of answer. It alleges that the appellees constructed the work for which the assessment was made, to collect which the precept appealed from issued; that before the appellees entered upon the work the appellant gave them notice that he would not pay for the improvement, and that their contract was void.

The most that is in this paragraph of answer is indefiniteness of statement and barrenness of fact, and it is only necessary to add that it does not even tend to disclose a defence to the action.

The demurrers to the complaint and to the first paragraph of answer present substantially the same questions, and we will, therefore, confine ourselves to a consideration of the answer.

The third paragraph of answer is, in substance, that the city attorney caused notice to be given for bids from contractors for the construction of the work, in accordance with the plans and specifications under the ordinance set out in the transcript; that when the bids were opened the appellees,

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bid was found to be \$2.20 per lineal foot for the work, and that of John A. Dobbins \$1.79 per foot; that with the bid of Dobbins was filed a good and sufficient bond in all respects as required by law, and his bid covered the entire work to be done the same as did that of the appellees; that the common council, recognizing that Dobbins was entitled to the contract, for the reason that his was the best bid, to avoid giving it to him, and that it might let the contract to the appellees upon their bid, by resolution resolved to let the work to the appellees if they would agree to construct gutters and sidewalks on the north side of said street to be improved, between east street and a certain bridge, and construct a certain water-way, free of cost to either the city or property-holders; that the appellees consented so to do, and they were awarded the contract; that no ordinance or resolution was ever passed by said council for the construction of said part of said sidewalk, gutters and water-way; nor was any notice given asking for bidders upon said work; that no such proposition as that made to the appellees by said resolution was ever submitted to said Dobbins or to any one else; that the cost of said additional work was \$500, thus increasing the cost of the improvement, as provided for in the ordinance, thirty-one cents per foot over Dobbins's bid; that two separate written contracts were executed with the appellees by said council, one to do the work provided for in the ordinance at the price of \$2.20 per lineal foot, the price named in the bid of the appellees, and the other to do the extra work as provided in the said resolution for the nominal sum of \$1.

It is not contended that all the proceedings from the beginning down to the time at which the said resolution was adopted for the construction of the extra sidewalks, gutters, etc., were not entirely regular.

The theory of the answer seems to be that when the additional work became a factor in the contract with the appellees, the subject of the contract was so different from

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the improvement contemplated by the ordinance therefor, and the notice to bidders, as not to be within the jurisdiction conferred by the one, nor within the scope of the other.

We are not inclined to this opinion. There is no question but that the common council had the power to choose between bidders, and when it had done so that its decision was final. Had it let the contract to the appellees without requiring the additional improvements, its action would have been conclusive. This being true, we are unable to understand any ground of complaint, because by the contract, as made, additional benefits were secured to the city and its property-holders. If the council arrived at the conclusion that the bid of the appellees was the best bid and at the same time could secure the additional sidewalks and gutters, and the water-way, without extra cost to the city, it was eminently proper that it do so.

We must presume that in its action the council acted in good faith and for the best interests of both the city and the property-holders, and exercised its discretionary powers wisely, and therefore accepted the bid of the appellees because it was the best bid, though not the lowest, and made the proposition for the construction of the additional improvements with the view of securing additional benefits to the city and its property-holders.

But, again, it must not be forgotten that this is an appeal from a precept, and that no question of fact can be tried which arose prior to the execution of the contract. Section 3165, R. S. 1881.

The questions which the appellant raises depend upon a state of facts which antedate the contract. But counsel for the appellant make the point that the same section of the statute requires the court or jury called upon to pass upon the issues joined to find "that the proceedings of such officers subsequent to said order directing the work to be done, are regular." Counsel have not quoted the entire sentence; the

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sentence, as a whole, explains itself. The remaining part of the sentence reads as follows: "that a contract has been made; that the work has been done, in whole or in part, according to the contract, and that the estimate has been properly made thereon. Then said court shall direct the property to be sold and conveyed by the sheriff thereof as the said treasurer is hereafter directed to sell and convey property liable to street improvements."

The contention of the appellant is in the teeth of the statute, and we may add that every question arising in the record has been thoroughly settled adversely to the appellant by the decisions of this court. See *Sims v. Hines*, 121 Ind. 534; *City of Elkhart v. Wickwire*, 121 Ind. 331; *Jenkins v. Steller*, 118 Ind. 275; *Ross v. Stackhouse*, 114 Ind. 200, and cases cited.

The judgment is affirmed, with costs.

Filed Nov. 12, 1890; petition for a rehearing overruled Feb. 4, 1891.

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139	398
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127	178
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127	178
159	12

No. 14,727.

DUVALL v. KENTON.

EVIDENCE.—*Expert Testimony.—Instruction.—Weight.—Interest.*—An instruction that "The jury, in judging of the weight of expert evidence, should consider the character of the witness and the interest, if any, he has in the case," is erroneous.

From the Jasper Circuit Court.

E. P. Hammond and W. B. Austin, for appellant.

S. P. Thompson, for appellee.

COFFEY, J.—This was an action by the appellant against the appellee to recover damages for the death of a horse. The complaint alleges, in substance, that the appellant was the owner of a stallion, about three years of age, of the

Duvall v. Kenton.

value of one hundred and twenty-five dollars; that he employed the appellee, who held himself out as an expert in castrating horses, to castrate said stallion, and to attend and treat him until he should be cured of the wounds and injuries occasioned thereby; that the appellee accepted and entered upon said employment, but conducted the same so negligently and unskillfully, and was so negligent and unskillful in attending and dressing the wounds thereby inflicted that said stallion died from the effects thereof, without any fault or negligence on the part of the appellant.

A trial of the cause by a jury resulted in a verdict for the appellee, upon which the court, over a motion for a new trial, rendered judgment.

The assignment of error calls in question the correctness of the ruling of the court in overruling the motion for a new trial.

It is contended by the appellant that the verdict of the jury is not supported by the evidence. The evidence in the cause is conflicting upon all the material issues in the cause and its weight was for the jury.

It is also contended by the appellant that the court erred in refusing to give to the jury certain instructions asked by him, and that it also erred in giving to the jury certain instructions asked by the appellee.

We have carefully examined the instructions given by the court, as well as those refused. We do not think the court erred in refusing to give the instructions asked by the appellant. In so far as they correctly stated the law, they were covered by the instructions given by the court. Nor do we think the court erred in giving any of the instructions asked by the appellee, except the eleventh. The eleventh instruction asked by the appellee, and given by the court, is as follows: "The opinions of experts are received in evidence, and may be considered and weighed from a consideration of the skill of such experts and the truth of the hypothesis on which his opinion is based. The jury in

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judging of the weight of expert evidence should consider the character of the witness and the interest, if any, he has in the case."

Instructions of this character have often been adjudged by this court to be erroneous. *Nelson v. Vorce*, 55 Ind. 455; *Millner v. Eglin*, 64 Ind. 197; *Greer v. State*, 53 Ind. 420; *Works v. Stevens*, 76 Ind. 181; *Fulwider v. Ingels*, 87 Ind. 414; *Finch v. Bergins*, 89 Ind. 360; *Woollen v. Whitaacre*, 91 Ind. 502; *Hartford v. State*, 96 Ind. 461; *Lewis v. Christie*, 99 Ind. 377; *Union Mut. L. Ins. Co. v. Buchanan*, 100 Ind. 63; *Unruh v. State, ex rel.*, 105 Ind. 117; *Bird v. State*, 107 Ind. 154; *Cline v. Lindsey*, 110 Ind. 337.

In the case of *Unruh v. State, ex rel., supra*, the instruction was as follows: "The relatrix and defendant have testified, and they are both interested in the event of the suit. This fact should be considered in weighing their evidence, in connection with the other facts and circumstances which I have indicated apply to witnesses generally." The court said of this instruction: "It very clearly discredits the parties named, because they are interested in the event of the suit. The charge is, that it was the *duty* of the jury to consider the fact that the parties named were interested in the event of the suit. The jury would not understand that on account of that interest greater weight was to be given to the testimony of interested parties. Very clearly, they understood that they were to give less weight to that testimony."

The jury are the exclusive judges of the weight to be given to the testimony of any witness, and an instruction which hampers them in the exercise of their duty in that respect is erroneous.

Expert witnesses were called and testified on behalf of the appellant, and we can not say that he was not prejudiced by the above instruction. The jury were plainly told that if any of such witnesses were interested in the event of the suit, that fact *must* be considered by them in weighing such testimony.

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From the circumstances attending the trial of the cause the jury may have reached the conclusion that some of the expert witnesses called by the appellant felt an interest in the result of the trial.

Judgment reversed, with directions to grant a new trial.

Filed Feb. 4, 1891.

No. 15,676.

GOODBUB v. THE ESTATE OF HORNUNG.

127	181
145	638
127	181
161	466
127	181
153	664
127	181
160	204
160	205
127	181
161	606

PROBATE PRACTICE.—*Demurrer.*—*Motion to Strike Out.*—A petition for the allowance of a claim as preferred, or exceptions filed to an administrator's report, may be tested by a demurrer or by a motion to strike out.

SAME.—*Sufficiency of Petition.*—*Court May Pass upon its Own Motion.*—The court, of its own motion, may pass upon or determine the sufficiency of a petition to allow a claim or of exceptions to a report without any demurrer or motion being filed, and exceptions taken to such action of the court presents the question for review.

SAME.—*Code of Civil Procedure.*—Whenever applicable the rule of procedure in civil causes should be applied in probate causes.

SAME.—*Examination of Report.*—*Formality.*—In most matters relating to the filing, examination and approval or disapproval of reports in probate matters, strict formality is not required; substance rather than form should be considered.

SAME.—*Preferred Claim.*—The question as to whether or not a claim should be paid as preferred can be raised at the time of the consideration of the final report, either by a petition or by exceptions.

SAME.—*Trial of Preferred Claims.*—A separate trial, to determine the right to have a claim preferred, can not be demanded; the right to a preference must be tried and determined in connection with the trial of the question as to the allowance of the claim.

SAME.—*Order of Priority.*—*Changing.*—*When Determined.*—The court can not change the order of priority of claims fixed by the statute. They may be allowed without inquiry as to the sufficiency of assets to pay them, and their priority determined afterwards.

SAME.—*Question Presented by Record.*—The filing of a petition to have a claim preferred, the court's overruling and refusing to grant the prayer thereof, and incorporating such petition and reciting the action of the court thereon in a bill of exceptions, do not show that the court overruled the petition and declined to allow the claim as preferred, upon the ground that the evidence did not show it to be a preferred claim; only the sufficiency of the petition in such an instance can be considered on appeal.

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CONSTITUTIONAL LAW.—Mechanic's Lien.—When Right to Vests.—The right to a mechanic's lien becomes vested at the time the material is furnished or labor performed, and this right can not be taken away by the Legislature.

SAME.—Control Over Remedy.—Legislative control over the remedy is so far restricted that the remedy given for the enforcement of a lien can not be materially impaired, upon the ground that the remedy available at the time of the contract is a part of it, and can not be taken away.

SAME.—Altering Remedy.—Changing.—Abolishing One of Two.—Whatever belongs merely to the remedy may be altered as the Legislature sees fit, if such alteration does not impair the obligation of the contract. The remedy may be changed, or one of two abolished, even though the new or remaining one be less convenient or less prompt and speedy than the one abolished.

MECHANIC'S LIEN.—Repeal of Statute.—Enforcement of Lien.—The right to a mechanic's lien is determined by the statute in force when the material is furnished or the labor performed. Such lien can not be taken away nor the remedy for its enforcement materially impaired; and if the statute giving it is repealed the courts will still enforce it in accordance with the remedy given by such repealed statute; yet, if the repealing statute provides an adequate remedy, the lien must be enforced by the law existing at the time of bringing the action.

SAME.—Presumption as to Time Material was Furnished.—In an action to enforce a mechanic's lien, where a note had been given for the amount of material furnished or labor performed,

Held, that the presumption was, in the absence of evidence, that the last of the material was furnished and the last of the labor was performed at the time the note bore date.

SAME.—Insolvent Owner of Building.—Preferred Claims.—The act of March 9, 1889 (Acts 1889, p. 257; Elliott's Supp., section 1705) gives a preference, where the owner of the building is in failing circumstances or insolvent, both to the laborer and to the material man.

SAME.—Specific Preference.—Such preference will not entitle the holder of the preferred claim to payment in full out of the general assets of the estate, but it is a specific preference reaching only the specific fund derived from the property to which the lien would attach.

SAME.—Failure to Give Notice—Amendment of 1889.—Preferred Claims.—Material was furnished while the act of March 6, 1883 (Acts 1883, p. 140; Elliott's Supp., section 1688) was in force, which act required notice of intention to hold a lien to be given within sixty days after the material was furnished. Fifty-seven days after the material was furnished for a house, the act of March 9, 1889 (Acts 1889, p. 257; Elliott's Supp., section 1705) was amended, which amendment provided, in addition to the provisions of the act of 1883, for the acquisition of a lien

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whether notice was filed or not; and, in case of the insolvency of the owner of the building, that the claims of the material man or laborer should be a preferred debt.

Held, that the failure to give notice before the act of 1883 was repealed did not prevent the foreclosure of the lien acquired in furnishing the materials, that such lien could be enforced without giving notice, and, the owner of the building being insolvent, that the claim could be enforced as a preferred one.

From the Floyd Circuit Court.

J. V. Kelso, C. D. Kelso, G. V. Howk and J. C. Zulauf, for appellant.

C. L. Jewett and H. E. Jewett, for appellee.

McBRIDE, J.—Appellant filed a claim against the estate represented by the appellee, reciting its nature and origin, and asking to have it allowed as a preferred claim.

The administrator, by an entry on the margin of the appearance docket, allowed it as a “general and unpreferred claim.”

The estate was afterwards found to be insolvent, and ordered to be settled accordingly.

In due time the administrator filed his final report, and caused notice to be given of the time set for its hearing.

When the report came up for hearing appellant appeared and filed a written petition, reciting the filing of said claim and its allowance by the administrator, setting out a copy of the claim, and asking for an order directing the administrator to pay the claim in full, as preferred.

Of this petition the bill of exceptions says: “And the court, after argument of counsel, overruled said petition and refused to grant the prayer thereof.”

Appellant excepted, and thereupon filed exceptions to the final report. One of the exceptions was that said claim had been admitted as an unpreferred claim by the administrator, “Whereas it is a preferred claim.” It is then said in the bill of exceptions: “And the court, after argument of counsel, overruled said written exceptions.” Appellant, as to each

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of said rulings, excepted, and the questions were saved by a bill of exceptions.

Counsel for appellee earnestly insist that the record presents no question which this court can consider. They say: "Neither of these questions is presented by the record in any form in which they can avail the appellant in this court. No question of law was raised by any pleading before the circuit court, and the petition to have the appellee's claim allowed as a preferred claim, as well as his exceptions to the report, was overruled by the court because there was no proof to sustain the petition or the exceptions. The bill of exceptions does not contain any of the evidence given at the hearing, and, therefore, while the action of the circuit court was clearly right on the premises, even if it had been wrong, and against the weight of the testimony, the Supreme Court would be unable to decide the question because of the absence of any statement as to what proof was offered in support of the allegations made by the appellant."

With all respect for the ability and learning of counsel we must say that they are wrong in this contention.

As above stated, the recitals in the bill of exceptions immediately following the filing of the petition, and the exceptions to the report respectively, are, "And the court, after argument of counsel, overruled said petition and refused to grant the prayer thereof," "and the court, after argument of counsel, overruled said written exceptions." To what was the argument of counsel addressed? No evidence whatever seems to have been introduced or offered, and counsel say the court thus acted because there was no proof to sustain the petition or the exceptions.

If the bill of exceptions showed that the ruling of the court was upon the ground that there was no proof, or that the proof offered was insufficient, a very different question would be presented from that which we think the record requires us to decide. We can, however, only consider such questions as are in fact presented by the record, and we think

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the only fair inference we can draw from the bill of exceptions is that the argument of counsel was addressed to the sufficiency of the petition and of the exceptions respectively, and that the ruling of the court was, in effect, that upon the facts thus presented the appellant was not entitled to the relief asked.

Counsel for appellee say, however, if the "appellee had, by any pleading, challenged the sufficiency of the facts stated in the petition or exception, and the court had held as matter of law that they were not sufficient, and the proper question had been reserved, a question of law would have been presented to this court."

When a petition of this character is presented to the court, or exceptions are filed to a report of an administrator, we think their sufficiency may be tested by a demurrer, or by a motion to strike out. We also think, however, that the court may, of its own motion, in such cases pass upon and determine the sufficiency of the petition or of the exceptions without any demurrer or motion being filed. So far as exceptions to reports are concerned this is, in effect, a matter of frequent occurrence, when the court ignores or declines to hear testimony upon exceptions which it deems insufficient to present any valid objection to the approval of the report. The practice in probate matters in this State is *sui generis*.

Whenever applicable we think the rules of procedure in civil causes should be applied, but in most matters relating to the filing, examination and approval or disapproval of reports, strict formality is not required. While all persons interested in the estate are constructively present, as matter of fact we must know that, as a rule, the majority of them are of necessity absent and unrepresented, or are nominally represented by the administrator or executor. Many of them are infants, or are under other legal disabilities, and the courts in passing upon such matters should be more observant of substance than of form.

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The question as to whether or not a claim should be paid as preferred may properly be raised at the time of the consideration of a final report. We think it may be raised either by a petition, as was done in this case, or by exceptions to the report. The appellant when he filed his claim recited therein the facts which he claimed entitled him to a preference. If the administrator had refused to allow it, and it had been transferred to the trial docket, a demurrer to it would not have tested the sufficiency of its averment relating to a preference. Nor could a separate action have been maintained to try that question. *Jenkins v. Jenkins*, 63 Ind. 120. That question *may* be tried and determined in connection with the trial of the question as to the allowance of the claim. *Blankenbaker v. Bank of Commerce*, 85 Ind. 459. The rule in such cases is, however, as stated in *Fickle v. Snepp*, 97 Ind. 289: "Claims may be allowed without inquiring whether there are assets sufficient to pay them, or whether they are or are not members of a preferred class. The allowance comes first; the direction as to payment comes afterward. The statute fixes the order of priority of claims, and this the courts can not change." See, also, *Jenkins v. Jenkins, supra*.

The entry by the administrator on the appearance docket of his allowance of the claim "as a general and unpreferred claim," while it was, under section 388, Elliott's Supp., operative between the claimant and the administrator as an adjudication of the validity and amount of the claim, had no effect upon the right of the claimant to insist upon having the claim treated as preferred.

When in due course that point in the administration of an estate is reached when it becomes the duty of the court to decide the manner of distributing the assets, a claimant has the undoubted right to insist upon his preference if he claims one.

If the facts recited in the claim and petition or motion are, in the judgment of the court, legally sufficient to entitle

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the party to the preference, it becomes then a question of fact. If the administrator admits the facts to be as stated, the claim should be allowed as preferred, but if the facts are disputed the court may hear evidence. If, however, the court, without the filing of a demurrer or a motion to strike out, decides that the facts stated in the claim and petition are not sufficient in law to entitle the party to the preference claimed, we think an exception to such ruling, properly saved by a bill of exceptions, will authorize this court to review the action of the court below.

This seems to us, from an examination of the record, to have been the course pursued. As we understand the bill of exceptions, the circuit court by its rulings simply held that the facts brought to its notice by the petition and by the exceptions to the report, respectively, were not sufficient in law to entitle the party to the preference. We conclude, therefore, that the question is fairly and properly presented to this court.

This brings us to the consideration of what we regard as a much more difficult question. Was the appellant entitled to an order for the payment of his claim as a preferred claim?

The claim filed was a note for \$600, dated January 11th, 1889, given by the decedent to appellant, due four months after date. Accompanying the note was a verified statement, in which, with other things, it was averred that the consideration for the note was material furnished to and labor performed by claimant for decedent in his lifetime in the repair of a certain brewery building belonging to decedent, and making and building an addition thereto in the year 1889, and that at the time of the completion of said repairs and of said brewery building the decedent was in failing circumstances, and that his estate was insolvent.

The report of the administrator shows that after the payment of all expenses of administration and of all claims which he had allowed as preferred, there remained for dis-

Goodbub *v.* The Estate of Hornung.

tribution \$8,428.06, and it was agreed by the parties that of this amount \$1,000 was received by the administrator from the sale of the addition to the brewery referred to in appellant's claim.

It is further shown by the report that if appellant's claim is not preferred the assets will pay 35 per cent. of claims due to creditors. The court ordered the distribution of 33½ per cent. of the money among the creditors, and the retention by the clerk of the residue to await the final decision of this case.

At the date of this note, January 11th, 1889, the following statute was in force relating to mechanics' liens (section 1688, Elliott's Supp.):

"Section 1. Be it enacted, etc., That mechanics, and all persons performing labor or furnishing material or machinery for erecting, altering, repairing or removing any house, mill, manufactory, or other building, bridge, reservoir, system of water-works, or other structure, may have a lien, separately or jointly, upon the house, mill, manufactory, or other building, bridge, reservoir, system of water-works, or other structure which they may have erected, altered, repaired or removed, or for which they may have furnished material or machinery of any description, and on the interest of the owner of the lot or land on which it stands, or with which it is connected, to the extent of the value of any labor done or materials or machinery furnished, or both."

Section 3 of this act requires any person wishing to acquire such lien to file in the office of the recorder of the county at any time within sixty days after the performing of such labor or furnishing of such materials or machinery, notice of his intention to hold a lien upon such property for the amount of his claim.

This statute was approved March 6th, 1883.

On the 9th day of March, 1889, an act of the Legislature was approved amending certain sections of the act of 1883, from which we have quoted. This latter act had an emer-

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gency clause, and therefore took effect at once. By the act of March 9th, 1889, section 1, above quoted, was amended to read as follows:

"Section 1. That contractors, sub-contractors, mechanics, journeymen, laborers and all persons performing labor or furnishing material or machinery for erecting, altering, repairing or removing any house, mill, manufactory, or other building, bridge, reservoir, system of water-works, or other structure, may have a lien, separately or jointly, upon the house, mill, manufactory, or other building, bridge, reservoir, system of water-works, or other structure which they may have erected, altered, repaired or removed, or for which they may have furnished material or machinery of any description, and on the interest of the owner of the lot or land on which it stands, or with which it is connected, to the extent of the value of any labor done, or material or machinery furnished, or both, and all claims for wages for mechanics and laborers employed in or about any shop, mill, wareroom, storeroom, or manufactory, shall be a first lien upon all the machinery, tools, stock of materials, or work, finished or unfinished, located in or about such shop, mill, wareroom, storeroom, or manufactory, or used in the business thereof; and should the person, firm or corporation be in failing circumstances, the above mentioned claims shall be preferred debts, whether notice of lien be filed or not."

Elliott's Supp., section 1705.

This statute, like that of 1883, requires the filing in the recorder's office, within sixty days after the performance of the labor or furnishing of material, etc., of a notice similar in terms to that required by the other statute. Appellant did not file any notice, but insists that by virtue of the provisions of section 1 of the act of March 9, 1889, decedent having been in failing circumstances when the labor was done and material furnished, his claim therefor is a preferred debt, and he is entitled to have it paid in full.

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Appellee's position with reference to the claim of preference under this statute is as follows:

1. The act of March 9, 1889, not having been enacted until after the work was done, material furnished and the note taken, does not apply to this transaction, and appellant is not entitled to the benefit of its provisions.

2. That, by a fair construction of the statute, no claims are to be preferred, except those for wages due to mechanics and laborers.

We will consider these questions in inverse order. Does the preference given embrace claims of this character?

The section in question first provides for a lien upon certain structures, and the land upon which they are situate, in favor of those performing labor or furnishing material or machinery for the erection, altering, repairing or removing of such structures, and, secondly, for a lien upon machinery, tools, stock of materials and work, finished or unfinished, in favor of mechanics and laborers employed in and about the establishment. The claims of all these different classes of persons are provided for by the same section—one class of claims to be secured by a lien on the structure and the other by a lien on the machinery, tools, etc., and the section concludes by the statement, that in a certain contingency "*the above mentioned claims* shall be preferred debts." All of these persons desiring to secure the lien to which they are entitled must proceed in the same manner. They must file the same kind of notice, in the same place, and within the same time.

We know of no rule of construction that would justify us in giving to the concluding provision of this section the limited interpretation contended for by appellee. The obvious meaning of the Legislature, as we gather it from the language used, was that, if the persons, firms or corporations owning the structures, or operating the shops, mills, etc., previously named in the section were insolvent, all claims embraced within its terms should be preferred debts, etc.

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Any other construction would be forced, and would do violence to the language used.

Does the act of March 9th, 1889, apply to this claim? The averment in the claim is, that the consideration for the note was certain material furnished and labor performed in the year 1889. The note was executed January 11th, 1889. We have concluded that the date of the note will be presumed to mark the time when the last of the material was furnished and the last of the labor performed. If we are right in this, appellant, if he desired to secure his claim by a lien on the premises, was required to file notice in the recorder's office within sixty days from that date, or on or before March 12th, 1889. The act of March 9th, 1889, therefore, took effect three days before the expiration of the time within which appellant was required to file his notice.

As a general rule statutes operate prospectively only. Cooley Const. Lim. 455.

It is now settled by the weight of authority that the right to a mechanic's lien under a statute becomes a vested right at the time the material is furnished and the labor performed, and that this right can not be taken away even by the Legislature. Jones Liens, section 1558, and authorities there cited. Even the legislative control over the remedy is so far restricted that the remedy given for the enforcement of the lien can not be materially impaired. *Buser v. Shepard*, 107 Ind. 417. This is upon the ground that remedies which are available for the enforcement of a contract at the time and place where it is made, are a part of its obligation, and that to allow the remedy to be taken away or materially restricted would, to that extent, impair the obligation of the contract. Cooley Const. Lim. 350.

Whatever belongs merely to the remedy may be altered according to the will of the statute, provided the alteration does not impair the obligation of the contract. Cooley Const. Lim. 346.

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Laws changing remedies for the enforcement of legal contracts, or abolishing one remedy when two or more existed, may be perfectly valid, even though the new and remaining remedy be less convenient than that which was abolished, or less prompt and speedy. Cooley Const. Lim. 347, and cases cited.

It follows, therefore, that in so far as a right to a mechanic's lien in a given case is concerned, we must look only to the statute in force when the material or machinery is furnished or the labor is done; and, also, that in so far as there may be an attempt by legislation to take away or materially impair the remedy for the enforcement of such lien, neither leaving nor substituting an efficient remedy, we must look to the same source.

Subject to this exception the rule has been laid down, we think correctly, that the rights of the parties under mechanic's lien laws are to be ascertained and fixed by the law in force when the contract is made, but such rights are to be established and enforced by the law existing at the bringing of the suit. Phillips Mech. Liens, section 24; *Willamette Falls, etc., Co., v. Riley*, 1 Oregon, 183; *Andrews v. Washburn*, 3 S. & M. 109.

The case of *Paine v. Woodworth*, 15 Wis. 327, seems to be directly in point upon the question here presented. In that case the court says: "We have no doubt that after work had been done for which the party was entitled to a lien under the Revised Statutes, and before the expiration of the time within which he might proceed to enforce it, it would be competent for the legislature to provide a new and more efficacious remedy, and that such lien might then be enforced according to that. And the objection that the party had not complied with the old statute, would be of no avail. That it is competent for the Legislature to change the remedy in such cases, is too well understood to need argument."

In so far as the right to a lien is concerned, and the means for securing and enforcing it, the act of March 6th, 1883, and

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the amendatory act of March 9th, 1889, are, as applied to this appellant, practically the same. The act of March 9th, 1889, however, gives an additional remedy if the debtor is in failing circumstances, and relieves the claimant from the necessity of filing the notice. We are of the opinion that this affects the remedy only. As the amendatory statute became operative before the expiration of the time within which appellant had the right to file his notice in the recorder's office, and thus establish his lien, he had the right to avail himself of the new and additional remedy thus given him.

The preference which the statute thus gives will not entitle the holder of the preferred claim to payment in full out of the general assets of the estate, but it is a specific preference reaching only the specific fund derived from the property to which the lien would attach. If such fund is sufficient in amount to pay the preferred claims in full, they should be so paid. If, however, such fund is insufficient for this purpose, the holders of preferred claims are entitled to share *pro rata* in the fund, and as to any unpaid balance due them would stand on the footing of the general creditors. Necessarily, in such case, the class of preferred claimants, as to such fund, will embrace all who, as to the specific property, come within the terms of section 1 of the amendatory act, whether they have filed notice in the recorder's office or not.

In this case it is shown that \$1,000 of the assets of the estate remaining for distribution was received by the administrator from the sale of the addition to the brewery referred to in appellant's claim.

The judgment is reversed, with instructions to the circuit court to proceed in accordance with this opinion.

Filed Feb. 4, 1891.

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The State *v.* Place *et al.*

No. 15,778.

THE STATE *v.* PLACE ET AL.

CRIMINAL LAW.—*Affidavit for Continuance.*—*Sufficiency of.*—An affidavit of the prosecuting attorney for a continuance on the ground that because of a change by the court of the time appointed for trial he was not able to secure the attendance of a certain witness named in the affidavit, which does not show that he did not have information of the change of the time appointed in season to secure the testimony of said witness, is insufficient.

From the Wells Circuit Court.

W. A. Branyan, Prosecuting Attorney, for the State.
A. N. Martin and *E. C. Vaughn*, for appellees.

ELLIOTT, J.—The State prosecutes this appeal and alleges that the trial court erred in denying the application of the prosecuting attorney for a continuance. We shall not examine the objections of the appellees to the mode in which the prosecuting attorney assumes to present the question, for the law is so plainly against the State upon the principal question that there is no difficulty in disposing of it.

It appears from the affidavit of the prosecuting attorney that on Wednesday, the 11th of December, 1890, the case was set down for trial on the 18th day of that month, and that the court subsequently changed the time for trial to Monday, December 16th, but the affidavit does not show when the State was informed of the change of the time appointed for the trial. For anything that appears, the prosecuting attorney may have had ample time to secure the attendance of the witness named in his affidavit. The trial court had, of course, a right to change the time appointed for trial, and was under no duty to consult the prosecuting attorney respecting the change, although it was bound to allow the State a reasonable opportunity to obtain its witnesses. It was incumbent upon the prosecuting attorney to show that he did not have information of the change of

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the time first appointed for the trial in season to secure the testimony of the witness.

There are other defects in the affidavit, but we deem it unnecessary to notice them.

Judgment affirmed.

Filed Feb. 5, 1891.

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No. 14,620.

BYRAM ET AL. v. STOUT.

CHATTEL MORTGAGE.—Sale on Execution.—Personal property under mortgage may be levied upon and sold by execution, subject to the mortgage lien.

SAME.—Nature of Mortgagee's Interest.—The mortgagee of personal property is a mere lien-holder.

SAME.—Attachment of Mortgaged Property by Mortgagee.—Waiver of Lien.—

Estoppel.—A levy of a writ of attachment by the mortgagee upon personal property mortgaged to him is not a waiver of his mortgage lien; and the mere fact of the levy does not estop him to foreclose or claim under his mortgage lien.

From the Rush Circuit Court.

T. S. Rollins, for appellants.

S. Claypool and W. A. Ketcham, for appellee.

BERKSHIRE, J.—The appellee brought this action to foreclose a chattel mortgage executed by John S. Matthews and Mary J. Matthews.

The appellants, on their own motion, were made parties defendant, claiming to be junior mortgagees, and filed an answer in bar of the action, and a cross-complaint, in each of which they asserted that their mortgage lien was superior because of the fact that the appellee had, prior to the commencement of this action, brought suit upon the evidences of debt secured by his said mortgage, and had caused a writ

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of attachment to issue, which had been levied upon the mortgaged property.

The contention of the appellees is that when the appellant sued out his writ of attachment and caused it to be levied upon the mortgaged property, he thereby released his mortgage lien; and this is the only question presented for our consideration.

There are some authorities to support the contention of the appellee. *Jones Mortgages*, section 565; *Evans v. Warren*, 122 Mass. 303; *Buck v. Ingersoll*, 11 Met. 226; *Whitney v. Farrer*, 51 Me. 418; *Libbey v. Cushman*, 29 Me. 429; *Haynes v. Sanburn*, 45 N. H. 429.

These authorities, however, depend upon a mere legal technicality, and not upon any principle in equity.

As the court says, *Evans v. Warren, supra*, the liens respectively created by mortgage and by attachment on the same property can not co-exist, for the reason that, under the Massachusetts statutes, the equity of redemption of personal property is not subject to attachment, and hence if the mortgagee causes an attachment to issue against the mortgaged property, it is a waiver of the mortgage lien. This reasoning is not very satisfactory.

Jones, supra, follows the language employed by the court in *Evans v. Warren, supra*. But in the same section referred to above, *Jones* says that under a statute which makes a mortgage a mere lien upon the property without conferring any title to it, it is probable that an attachment of the mortgaged property by the mortgagee would not amount to a waiver of the mortgage lien, but would be a cumulative remedy. Under our statutes the mortgagee is but a lien-holder.

It has been held many times by this court that personal property under mortgage may be levied upon and sold by execution, subject to the mortgage lien. *Broadhead v. McKay*, 46 Ind. 595; *Sparks v. Compton*, 70 Ind. 393; *Em-*

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mons v. Hawn, 75 Ind. 356; *Geisendorff v. Eagles*, 70 Ind. 418.

Section 722, R. S. 1881, especially provides that goods and chattels pledged or mortgaged may be levied upon and sold on execution.

Section 918, R. S. 1881, requires the officer holding the order of attachment to seize and take into his possession the property of the defendant in his county, not exempt from execution.

The following cases support the conclusion that the mortgagee of personal property is a mere lien-holder: *Manns v. Brookville National Bank*, 73 Ind. 243; *Evansville, etc., Co. v. State, ex rel.*, 73 Ind. 219; *Heimberger v. Boyd*, 18 Ind. 420; *Coe v. McBrown*, 22 Ind. 252; *State, ex rel., v. Milligan*, 106 Ind. 109; *Kackley v. State, ex rel.*, 91 Ind. 437.

In *Thurber v. Jewett*, 3 Mich. 295, it is held that an attachment of the mortgaged property by the mortgagee is not a waiver of his lien. See the following cases as throwing some light upon the question: *Shuler v. Boutwell*, 18 Hun, 171; *Hill v. Beebe*, 13 N. Y. 556; *Daly v. Proetz*, 20 Minn. 411.

There is no element of estoppel to be considered, for the reason that the appellants' position was in no way changed or prejudiced by the attachment proceedings.

We find no error in the record.

Judgment affirmed, with costs.

Filed Feb. 4, 1891.

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127	198
129	147
127	198
132	252
127	198
143	484
127	198
154	389

No. 14,633.

GOODELL ET AL. v. STARR ET AL.

JUDGMENT.—*Collateral Attack.*—*Sufficiency of Notice by Publication.*—When notice is given by publication the judgment of the court acting upon such notice, that the publication and affidavit upon which it is based are sufficient to give it jurisdiction, is conclusive upon all parties as against a collateral attack. *Fontaine v. Houston*, 58 Ind. 316; *Brenner v. Quick*, 88 Ind. 546; and *Vizard v. Taylor*, 97 Ind. 90, denied.

REAL ESTATE, ACTION TO RECOVER.—*Color of Title.*—*Occupying Claimants.*—*Purchaser at Foreclosure Sale.*—A sale of land under a decree of foreclosure is sufficient to give the purchaser and those claiming under him color of title as against all the world; and such purchaser, and those claiming under him, are entitled to the benefit, in a proper case, of the occupying claimant law.

SAME.—*Owner of Fee not Made a Party.*—*Effect.*—*Subsequent Foreclosure Against Grantee.*—A foreclosure against the mortgagor after he has conveyed the land is void as to his grantee, unless such grantee is made a party to such proceedings, and joining him in the complaint, but not serving him with process, and not taking judgment against him, until after decree of foreclosure and sale of the land as against the mortgagor, will not deprive him of title to the land mortgaged, nor render the former foreclosure proceedings, as to him, valid.

SAME.—*Occupying Claimant.*—*Possession of Land.*—A grantee of mortgaged lands, although he has not paid off the mortgage, is entitled to the possession of the premises conveyed to him, even after foreclosure and sale as against the mortgagor; but in an action to obtain such possession, the purchaser at the foreclosure sale, who has obtained possession by virtue of such sale, may maintain a cross-complaint to have the mortgage foreclosed as against the grantee; and such mortgage may be foreclosed, and the land, if the decree is not satisfied within a time designated, may be ordered sold without relief from valuation or appraisement laws; and such grantee can not claim the possession until he has paid off the decree. Section 1085, R. S. 1881.

From the Porter Circuit Court.

W. Johnston, — *Winslow* and — *Varnum*, for appellants.

A. D. Bartholomew, *E. D. Crumpacker*, *W. H. Dowdell* and *W. E. Pinney*, for appellees.

McBRIDE, J.—Appellants brought this suit to recover possession of five hundred and sixty acres of land in Porter county, and to quiet their title thereto.

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April 3d, 1867, one Lazarus Silverman obtained a decree of the Porter Circuit Court foreclosing a mortgage on the land in question. The sheriff of Porter county sold the land under this decree on the 7th day of June, 1867, and Silverman became the purchaser, paying \$7,000 therefor. June 8th, 1868, he received a sheriff's deed, and immediately entered into possession.

The appellees are in possession, claiming under Silverman, and the possession of Silverman and those claiming under him, has been continuous from said 8th day of June, 1868, to the time of the commencement of this suit.

The mortgage which Silverman foreclosed was executed by one John W. Hughes January 3d, 1866, to one Rodney Whipple.

Whipple assigned it to Silverman on the 5th day of January, 1866, and it was duly recorded January 11th, 1866. Hughes, the mortgagor, was the owner of the land when the mortgage was made, but on the 1st day of August, 1866, with his wife, executed a warranty deed for it to one Jacob S. Goodell.

Goodell's deed was recorded February 13th, 1867, but he never entered into possession of the land, and Hughes remained in possession thereof until the expiration of the time for redemption from said sale, when he yielded possession to Silverman.

In the suit to foreclose the mortgage Hughes and wife, Goodell and wife, and some others, were named as defendants, but no process of any kind was ever served upon Goodell or his wife prior to the rendition of said decree of foreclosure, April 3d, 1867, and no decree was then rendered as against Goodell and wife, the case was as to them continued from time to time until May 7th, 1869, when, on an affidavit filed publication was ordered made as to them as non-resident defendants. September 21st, 1869, proof of publication having been made, Goodell and wife were de-

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faulted, and a decree was rendered foreclosing the mortgage as against them.

No action seems ever to have been taken under the decree of September 21st, 1869.

The appellants here are the heirs of Jacob S. Goodell, who died about six years before the commencement of this suit. This suit was commenced January 3d, 1887. With other pleadings the appellees filed a cross-complaint, in which they sought the benefit of the law for the relief of occupying claimants. They also filed a cross-complaint, asking to have their title quieted.

Counsel for appellants have filed a very earnest and well-written brief, but the questions discussed by them can not be considered by this court. Their argument is, in the main, addressed to the proposition that the affidavit upon which publication was ordered in May, 1869, was not sufficient to justify the order for publication; that as a consequence the judgment recovered against Goodell, September 21st, 1869, was void, for the reason that the court did not acquire jurisdiction by such defective notice; and that before the commencement of this suit the statute of limitations had barred any action on the original note and mortgage, so that they can not now form the basis of any claim on the part of appellees.

As appellees are in possession under a sheriff's sale, made more than two years before the rendition of the decree of foreclosure of September 21st, 1869, it is apparent that it is altogether immaterial whether the latter judgment is void or not. In view, however, of the earnestness and evident sincerity with which appellants have discussed this question, we will say, in passing, that the cases of *Fontaine v. Houston*, 58 Ind. 316, *Brenner v. Quick*, 88 Ind. 546, and *Vizzard v. Taylor*, 97 Ind. 90, do not state the rule recognized by this court relative to judgments or decrees rendered on service of notice by publication. The cases of *Quarl v. Abbott*, 102 Ind. 233, *Field v. Malone*, 102 Ind. 251, *Picker-*

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ing v. State, 106 Ind. 228, *Kleyla v. Haskett*, 112 Ind. 515, *Essig v. Lower*, 120 Ind. 239, and many others decided since the case of *Quarl v. Abbott*, *supra*, lay down that which we regard as the correct rule on that subject. When notice is given by publication the judgment of the court acting upon such notice, that the publication and the affidavit upon which it is based are sufficient to give it jurisdiction, is conclusive upon all the parties as against a collateral attack.

As heretofore said, appellees hold under Silverman, whose title rested on the foreclosure sale of June 7th, 1867. The ancestor of appellants was not before the court when that decree was rendered, and it does not purport to bind him. The foreclosure at that time was only against such parties as had previously been served. Goodell at that time held the legal title, and the sale under that decree was void as to him, and the court below correctly held that appellants, as his heirs, were the owners and entitled to the possession of the land. It also correctly refused to quiet appellees' title thereto.

The decree of foreclosure and the sheriff's sale, although void as to Goodell, was sufficient to give to Silverman and those claiming under him color of title. *Sims v. Gay*, 109 Ind. 501; *Wright v. Kleyla*, 104 Ind. 223; *Brenner v. Quick*, 88 Ind. 546; *Bauman v. Grubbs*, 26 Ind. 419; *Doe v. Hearick*, 14 Ind. 242; *Vancleave v. Milliken*, 13 Ind. 105; *Bell v. Longworth*, 6 Ind. 273; *Pillow v. Roberts*, 13 How. 472; *Marston v. Hobbs*, 2 Mass. 433.

Being in the occupancy of the land under color of title they were entitled to the benefit of such statutory provision as the Legislature has made in behalf of occupying claimants.

The court found generally for the plaintiffs on their complaint, that they were the owners and entitled to the possession of the land in controversy, and made the following finding on defendants' cross-complaint:

"And the court also finds for the defendants, Phebe E.

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Starr, Kitty L. McGill, Andrew B. Pierce, Louis Kendt and _____ Kendt, on their cross-complaints herein, that they are in possession of said land under and by virtue of a certain sheriff's deed executed to one Lazarus Silverman on the — day of June, 1868, conveying said real estate, and by several *mesne* conveyances thereafter made, and supposed themselves to be the owners thereof in fee simple; and the court further finds that the said sheriff's deed to said Silverman was ineffectual to convey the title to said land; and the court further finds that under such color of title said defendants have made lasting improvements on said land, and paid the taxes and assessments thereon, and that the rents and profits of said real estate since the defendants have been in possession thereof under such color of title are equal to the taxes and assessments paid and improvements made thereon; and the court further finds that at the time said Jacob S. Goodell became the owner of said real estate, said real estate was encumbered by a mortgage, which was afterwards assigned to said Silverman, through which he obtained his sheriff's deed; that said mortgage was never regularly foreclosed against said Jacob S. Goodell or his heirs, and that the said real estate, and the interests of plaintiffs therein, are subject thereto, and that there is due thereon the sum of sixteen thousand dollars; that the same is a valid and first lien on said land, and that said land is bound for the payment thereof, and that said land is worth twelve thousand dollars."

Upon the findings thus made it was adjudged by the court:

1st. That the plaintiffs (appellants) were owners in fee simple, and entitled to the possession of the land in controversy; and,

2d. The following order was made:

"And it is further adjudged and decreed by the court that the mortgage lien of the defendants on said real estate be and the same is hereby foreclosed, and that the equity of redemption of the plaintiffs, and each of them, and any person or

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persons claiming by, through or under them in and to said real estate, be and the same is hereby forever barred and foreclosed ; * * * and it is further ordered by the court that the plaintiffs shall, within the next sixty days, pay to the clerk of this court for the use of said defendants the sum of sixteen thousand dollars (\$16,000), together with the costs of this action, with interest ; and in default of such payment within said time, it is ordered that the said real estate, or so much thereof as may be necessary to pay said sum of sixteen thousand dollars and interest thereon, and costs, and accruing costs, shall be sold by the sheriff of Porter county as other lands and tenements are sold upon execution at law, without relief from valuation or appraisement laws, and after such sale plaintiffs shall have no right of redemption of said property.”

This finding and judgment is, in all essential matters, in substantial compliance with the statute.

We think the conclusion reached by the learned and able judge who tried the cause below is not only legally correct, but that it accords with every principle of equity and justice. An examination of the evidence discloses the fact that appellants' ancestor, through whom they claim the land, never had any actual interest in it. He was a tenant of the debtor and mortgagor, Hughes, renting of him and occupying another farm. He was not worth, when the deed was made, to exceed \$300. He paid no consideration whatever for the deed, and made no effort at any time to take possession of the land. Before he could have justly claimed the land he should have paid the \$8,000 mortgage, which was a valid lien on it when he took his deed.

Appellants' claim is absolutely without merit.

Judgment affirmed, with costs.

Filed Feb. 7, 1891.

Carr, Auditor, *et al. v. The State, ex rel. Coetlosquet.*

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129 101

No. 15,908.

CARR, AUDITOR, ET AL. v. THE STATE, EX REL. COETLOSQUET.

CONTRACT OF A STATE.—In entering into a contract a State lays aside its attributes as a sovereign and binds itself substantially as one of its citizens does when he enters into a contract. By the act of entering into a contract it abrogates the power to annul or impair it.

ACTION AGAINST A STATE.—*Failure to Make Appropriation.*—*Mandate.*—A State can not be sued, nor can an action for mandate to compel the payment of a valid claim of a State be maintained against its officers, unless an appropriation has been made by the Legislature for the payment of such claim; but a proceeding for a mandate may be maintained against the auditor of state, if a proper appropriation has been made, to compel him to draw a warrant for the amount due.

CONSTITUTIONAL LAW.—*One Department Controlling Another.*—One department of a State can not control another department; nor can the courts supply the omission of the Legislature to make an appropriation.

APPROPRIATION.—*Implied, what is.*—*Sufficiency.*—An appropriation need not be made in any particular form or in express terms; it may be implied. It is sufficient if the intention to make the appropriation is clearly evinced by the language employed in the statute upon the subject, or if it is evident that no effect can possibly be given a statute unless it be construed as making the necessary appropriation. Nothing more is requisite than the designation of the amount and the fund out of which it shall be paid; but a promise to pay, contained in a bond of the State, lawfully issued, is not an appropriation.

SAME.—*No Funds in Treasury.*—An appropriation may be made even when there is no funds in the treasury to meet it.

REPUDIATION.—*Presumption.*—A State has no right to repudiate its valid obligations, neither directly nor by indirection; and no such a purpose will be imputed to it by the court unless a contrary intention is clearly manifested. In ascertaining whether or not a State intended to repudiate a valid claim the whole course of legislation upon the subject will be examined by the courts.

SAME.—*Change of Remedy.*—A State has the power to withdraw a remedy, and thus defeat its creditor.

PAYMENT.—*Place of can not be Changed by Debtor.*—A debtor can not change the place where he has agreed to pay off his obligation.

CONTRACT.—*Law Part of.*—*Effect of Change of Law.*—The law in force at the time a contract is made enters into and becomes a part of it; and no subsequent change of the law can affect such contract.

REPEAL OF STATUTES.—*Repealing Act Unconstitutional.*—A repeal of a statute can not be accomplished by an unconstitutional statute; and if an act

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repealing a former act is invalid, an appropriation made by such former act is not affected by such invalid act, and remains in force.

SAME.—Effect upon Appropriation.—A State can not invalidate its contract after it is made by repealing the statute authorizing its creation; and an attempt to annul such a contract does not affect an appropriation made in the statute authorizing the assumption of the obligation.

INTEREST.—Liability of a State for.—A State is not liable for interest upon its obligations unless it contracts to pay it in pursuance of a statute authorizing the contract. The general interest statute does not apply to the State.

SAME.—Interest after Debt Due.—Compound Interest.—A statute authorized the issue of bonds of the State bearing interest at the rate of five per cent. per annum, payable semi-annually. No coupons were issued for the interest. If any instalment of interest was not demanded at a certain named place before the expiration of thirteen months from the time it became due, the State had the right to pay it at its own treasury. The bonds were made payable at the end of twenty years from the time of their issue, and after twenty years the State might, at its pleasure, redeem them.

Held, that the bonds drew five per cent. interest after the expiration of the twenty years; but that interest upon (or compound) interest could not be recovered.

STATE SINKING FUND DEBT.—Acts of 1846, 1847 and 1872.—Interest.—Failure to Demand when Bonds were Due.—State bonds were issued in 1852 under the acts of 1846 (Acts 1846, p. 1), 1847 (Acts 1847, p. 3), authorizing the funding of the State debt, payable in the city of New York. The act of 1846 created a sinking fund for the payment of the State's indebtedness. By an act of 1872 (Acts 1872, p. 27), the sinking fund was merged in the general fund of the State, and the State agency in the city of New York, and the sinking fund commissioners, established by the act of 1846, were abolished. Previous to 1872 such commissioners had stopped the payment of interest, and had declared that no interest would be paid on the bonds issued by authority of the acts of 1846 and 1847, because of the fact that none had been demanded for several years. Before stopping the payment of interest the commissioners had published a notice of their intention to do so, as to all bonds not presented in New York at the agency by a certain named date. This action of the commissioners was ratified by the act of 1872, and the bonds and interest declared payable at the office of the State treasury. In 1865 (Acts 1865, p. 48) an appropriation was made to pay off all of the State's indebtedness. The bonds in suit were not presented for payment, nor was payment demanded, until about 1890.

Held, that the action of the sinking fund commissioners in stopping payment of interest was unauthorized; that that part of the act of 1872 ratifying such action was unconstitutional, and that such bonds drew

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interest until actually paid at the rate specified in the bonds. Compound interest was denied.

From the Marion Superior Court.

A. G. Smith, Attorney General, and *J. H. Gillett*, for appellants.

I. P. Gray and *P. Gray*, for appellee.

ELLIOTT, J.—The Legislature of the State in 1846 and 1847 passed laws providing for the funding and payment of the public debt. Those acts authorized the auditor and treasurer of the state to execute certificates pledging the irrevocable faith of the State to the payment of the sum named in each of the certificates. Among the certificates issued were those upon which this action is founded. They are dated the 3d day of May, 1852, and are payable at the pleasure of the State at any time after twenty years from the 19th day of January, 1846. They provide for the payment of interest semi-annually at the rate of five per centum per annum; the days of such semi-annual payments are designated as the first days of January and July in each year. The payee of the certificates is described as Jean Baptiste Maurice du Coetlosquet, of Paris, and provision is made for the registry of the certificates. The place of payment of principal and interest is declared to be the city of New York.

No question is made as to the validity of the certificates, nor could any be successfully made. The certificates were issued under valid legislative authority and in accordance with duly enacted laws. There is, therefore, a complete and binding contract; no element is wanting nor is any incident absent.

As there is a perfect contract, the State is bound to perform it according to its legal tenor and effect, and to redeem the pledge it has declared to be irrevocable. In entering into the contract it laid aside its attributes as a sovereign and bound itself substantially as one of its citizens does

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when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a State whenever it enters into an ordinary business contract. *Hartman v. Greenhow*, 102 U. S. 672; *Poindexter v. Greenhow*, 114 U. S. 270; *Keith v. Clark*, 97 U. S. 454; *Murray v. Charleston*, 96 U. S. 432; *Gray v. State, ex rel.*, 72 Ind. 567; *State, ex rel., v. Cardozo*, 8 S. C. 71; *People v. Canal Com'rs*, 5 Denio, 401; *Georgia, etc., Co. v. Nelms*, 71 Ga. 301; *Lowry v. Francis*, 2 Yerg. 534; *Grogan v. San Francisco*, 18 Cal. 590.

The principle that a State, in entering into a contract, binds itself substantially as an individual does, under similar circumstances, necessarily carries with it the inseparable and subsidiary rule that it abrogates the power to annul or impair its own contract. It can not be true that a State is bound by a contract and yet be true that it has power to cast off its obligation and break its faith, since that would involve the manifest contradiction that a State is bound and yet not bound by its obligation. It may have the might and means of defeating the enforcement of a contract, yet, in a just sense, have no power to do so. Might and opportunity do not constitute power in the true sense; to constitute power another element must be present, and that element is right. If right is absent there is no power. Legislatures may, by a failure to make an appropriation, defeat a just claim, or, indeed, block the wheels of government, but under the Constitution they have no power to do any such thing. It seems very clear, therefore, that there is no constitutional power to annul or impair a valid contract entered into by a State, and so it has long been settled. *Fletcher v. Peck*, 6 Cranch, 87; *Terrett v. Taylor*, 9 Cranch, 43; *Trustees, etc., Co. v. Beers*, 2 Black, 448; *Davis v. Gray*, 16 Wall. 203; *Hall v. Wisconsin*, 103 U. S. 5; *People v. Platt*, 17 Johns. 195; *Montgomery v. Kasson*, 16 Cal. 189; *State, ex rel., v. Barker*, 4 Kansas, 379.

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There is one essential and far-reaching difference between the contracts of citizens and those of sovereigns, not, indeed, as to the meaning and effect of the contract itself, but as to the capacity of the sovereign to defeat the enforcement of its contract. The one may defeat enforcement, but the other can not. This result flows from the established principle that a State can not be sued. *Hans v. State*, 24 Fed. Rep. 55. Nor is this the only method under such a Constitution as ours by which a State may defeat the enforcement of its obligation, for the failure to make the necessary appropriation will effectually accomplish that object. *State, ex rel., v. Porter*, 89 Ind. 260; *May v. Rice*, 91 Ind. 546; *Rice v. State, ex rel.*, 95 Ind. 33. The Legislature has, therefore, the ability to avoid payment of the obligations of the State by a failure or refusal to make the necessary appropriation, although that body can not impair the obligation of the contract. Creditors who accept the obligations of a State are bound to know that they can not enforce their claims by an action against the State directly, nor by an action against its officers where no appropriation has been made as the Constitution requires. If, however, there is an effective appropriation, then an officer whose duty it is to draw a warrant upon the fund set apart by statute may be coerced into a performance of that duty. *Gray v. State, ex rel., supra*. But there is no power that can coerce the Legislature into making an appropriation, no matter how strong the justice of the creditor's claim, nor how plain the duty seems. Neither directly nor indirectly can such a result be accomplished; hence it is that where there is no statute making an appropriation no action will lie against the officers of the State. *State v. Stanton*, 6 Wall. 50; *Hans v. State, supra*. Whether an appropriation shall or shall not be made is a legislative question, and over purely legislative questions the courts have no supervision or control. A question of that character is beyond the touch of the judiciary, for one department of government can not enter the

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domain of another. *Smith v. Myers*, 109 Ind. 1, and authorities cited; *State, ex rel.*, v. *Haworth*, 122 Ind. 462, and authorities cited; *Wilson v. Jenkins*, 72 N. C. 5; *Goddin v. Crump*, 8 Leigh, 154; *Burch v. Earhardt*, 7 Oregon, 58; *Franklin v. State Board, etc.*, 23 Cal. 173; *People v. Pacheco*, 27 Cal. 175.

The right of the relator to compel the auditing and payment of his claim must, it is evident, depend upon whether there is an appropriation upon which a warrant can be rightfully drawn, and out of which it can be lawfully paid; for if there is no such appropriation the courts are powerless to assist him to enforce his contract, although they may not doubt its validity.

It is clear upon authority that the promise to pay, contained in the certificate, is not an appropriation. *Ristine v. State, ex rel.*, 20 Ind. 328; *State, ex rel.*, v. *Ristine*, 20 Ind. 345; *Newell v. People*, 3 Seld. 9; *Sunbury, etc., R. R. Co. v. Cooper*, 33 Pa. St. 278.

It does not, however, follow that because no claim can be enforced where there is no appropriation, the appropriation must be made in a particular form or in express terms. It is sufficient if the intention to make the appropriation is clearly evinced by the language employed in the statutes upon the subject, or if it is evident that no effect can possibly be given to a statute unless it be construed as making the necessary appropriation. In *Ristine v. State, ex rel.*, *supra*, it was said: "An appropriation of the money to a specified object would be an authority to the proper officers to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant if he has appropriated money in the treasury. And such an appropriation may be prospective, that is, it may be made in one year, of the revenues to accrue in another or future years, the law being so framed as to address itself to such future revenues. So a direction to

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the officers to pay money out of the treasury upon a given claim, or for a given object, may, by implication, include in the direction an appropriation." The point affirmed in the case of *Reynolds v. Taylor*, 43 Ala. 420, is thus stated by the reporter: "If the salary of a public officer is fixed, and the times of payment prescribed by law, no special annual appropriation is necessary to authorize the auditor to issue his warrant for its payment." To the same effect is the decision in *Nichols v. Comptroller*, 4 Stew. & P. 154. The same principle was asserted in a case where the Constitution, in general terms, provided what salary should be paid a public officer. *Thomas v. Owens*, 4 Md. 189. That case was followed and approved in the case of *Green v. Purnell*, 12 Md. 329. In the fully considered case of *State, ex rel., v. Hickman*, 8 Law. Ann. R. 403, the doctrine of the Maryland cases was approved and enforced. A similar doctrine was declared in the case of *State, ex rel., v. Weston*, 4 Neb. 216. The question as to what constitutes an appropriation was discussed by FIELD, C. J., in *McCauley v. Brooks*, 16 Cal. 11 (28), in an able opinion, and it was there said: "To an appropriation within the meaning of the Constitution, nothing more is requisite than a designation of the amount, and the fund out of which it shall be paid. It is not essential to its validity that the funds to meet the same should be at the time in the treasury. As a matter of fact, there have seldom been in the treasury the necessary funds to meet the several amounts appropriated under the general appropriation act of each year." It is evident from these authorities that an appropriation may be implied, and the debatable question is, what provisions are sufficient to create such an implication? To determine this question, it is necessary to examine the legislative enactments subsequent to those under which the bonds were issued, and from them ascertain whether an appropriation has been made. The decisions in the cases of *Ristine v. State, ex rel., supra*, and *State, ex rel., v. Ristine, supra*, declare that the acts of 1846 and 1847 did not make the requi-

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site appropriation, and hence we must search for it elsewhere.

While it is true that the acts of 1846 and 1847 can not, under the decisions referred to, be considered as making an appropriation, still they do exert some influence upon the question, and can not pass unheeded. They do pledge the faith of the State to the payment of the debt, and do provide that the certificates, together with the interest thereon, shall be paid out of the State revenues. Acts of 1847, p. 1. Independently of any provision of this character the presumption is, and ought to be, that the State meant to pay its debt, for the law, as well as equity, imputes an intention to fulfil an obligation. In justice a State has no right to repudiate its contract, either directly or by indirection, and no such purpose should be imputed to it. In *McCauley v. Brooks, supra*, it was said: "We deny both the right to repudiate and the fact of repudiation. The State possesses no such right, but upon her rests the same obligations to do justice and keep faith as rest upon individuals." In view of the provisions of the act of 1847, and of the general principles of equity and justice, the courts must assume, unless a contrary intention is clearly manifested, that the State did not intend to defeat its creditors by direct or indirect measures; hence we must assume in the construction of subsequent statutes (unless to make this assumption violates the language employed) that the State meant to make good its declaration in the act of 1847, and perform the promise contained in the contract of 1852. A series of acts, extending over a period of many years, shows an intention to provide means for the payment of the State debt, for various statutes provide measures for raising money to pay the certificates issued to the creditors of the State under the acts of 1846 and 1847. 1 R. S. 1852, p. 408; Acts 1861, p. 107; Acts 1871, p. 6.

It is unnecessary to refer to all of those acts, but of two of them it is necessary to speak with some particularity. In 1865 an act was passed wherein it was declared that it was

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the purpose of the General Assembly to provide for the prompt payment of the bonds or certificates issued under the acts of 1846 and 1847, and in that act duties concerning the payment of such evidences of indebtedness were imposed upon certain of the State officers. Acts 1865 (Spec. Sess.), p. 49. That act contains, among others, this provision: "All the money and funds properly belonging to either of said funds shall be denominated the State Debt Sinking Fund, and all such moneys are hereby set apart for the payment of such principal exclusively, and shall not, under any circumstances, be drawn or paid out of the State treasury for any other purpose whatever." This provision, taken in connection with other provisions of the act, so clearly makes an appropriation that there is no room for controversy, much less necessity for amplification. So far we encounter no difficulty, but such difficulties as we do encounter arise out of the act of December 13th, 1872. The third section of that act reads thus:

"Section 3. That the State debt sinking fund as a separate fund of the state treasury be discontinued from and after the 1st day of February, A. D. 1873, and be merged in, and constitute a part of, the general fund of said treasury, and all sums of money or claims now lawfully payable out of the said State debt sinking fund, shall, after the date last aforesaid, be payable out of the general fund of the State treasury."

This provision, even if it stood alone, must be regarded as making an appropriation within the meaning of the Constitution, but if it were true that there might be doubt if the provision were isolated from all others and considered in itself, there can possibly be none when it is considered, as it must be, in connection with the prior statute, and, under the rules of the law we have stated, so that if there is no valid provision in other sections of the act of 1872 contravening that contained in section 3, it must be held that there was a valid appropriation. If there is a provision destroying the appropriation it must be that contained in the

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first section of the act of 1872, since no other act professes to annul the appropriation. That section reads thus: "That the said action of the said board of State debt of sinking fund commissioners in stopping the interest on the two and a half and five per cent. certificates of State stocks, as aforesaid, is hereby ratified and approved, and that from and after the first day of February, A. D., 1873, the principal of such of said certificates as are still outstanding, with the interest that may have accrued thereon prior to the stoppage of interest thereon, as aforesaid, shall be payable at the treasury of the State, and not elsewhere." To understand this section it is necessary to quote one paragraph of the preamble of the act and to mention what action of the sinking fund commissioners it refers to. The paragraph of the preamble to which we refer reads as follows: "And, whereas, The board of State debt sinking fund commissioners of this State, on or about the first day of September, 1870, stopped the payment of interest on all the two and a half and five per cent. certificates of State stocks then outstanding, because of their non-presentment for payment, due notice having been given requiring their presentment for payment at the State agency in the city of New York, where the money was on deposit to redeem them." The action of the sinking fund commissioners, to which reference is made, consisted in ordering a presentment for payment and in giving notice by publication that unless the certificates were presented within a given time, interest should cease. If the provisions of section one are valid, there is no appropriation, but if they are invalid the appropriation made by the act of 1865 has not been annulled, since the effect of section 3 of the act of 1872 is to continue the appropriation; the only change made is in charging the general fund instead of the state debt sinking fund. That the appropriation as to the principal continued in force admits of no debate, and our judgment is that there is little doubt that it continues in force as to the interest promised to be paid by the State.

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LOSQUET.**

CONTRACT OF A STATE.—In entering into a contract a State lays aside its attributes as a sovereign and binds itself substantially as one of its citizens does when he enters into a contract. By the act of entering into a contract it abrogates the power to annul or impair it.

ACTION AGAINST A STATE.—*Failure to Make Appropriation.*—*Mandate.*—A State can not be sued, nor can an action for mandate to compel the payment of a valid claim of a State be maintained against its officers, unless an appropriation has been made by the Legislature for the payment of such claim; but a proceeding for a mandate may be maintained against the auditor of state, if a proper appropriation has been made, to compel him to draw a warrant for the amount due.

CONSTITUTIONAL LAW.—*One Department Controlling Another.*—One department of a State can not control another department; nor can the courts supply the omission of the Legislature to make an appropriation.

APPROPRIATION.—*Implied, what is.*—*Sufficiency.*—An appropriation need not be made in any particular form or in express terms; it may be implied. It is sufficient if the intention to make the appropriation is clearly evinced by the language employed in the statute upon the subject, or if it is evident that no effect can possibly be given a statute unless it be construed as making the necessary appropriation. Nothing more is requisite than the designation of the amount and the fund out of which it shall be paid; but a promise to pay, contained in a bond of the State, lawfully issued, is not an appropriation.

SAME.—*No Funds in Treasury.*—An appropriation may be made even when there is no funds in the treasury to meet it.

REPUDIATION.—*Presumption.*—A State has no right to repudiate its valid obligations, neither directly nor by indirection; and no such a purpose will be imputed to it by the court unless a contrary intention is clearly manifested. In ascertaining whether or not a State intended to repudiate a valid claim the whole course of legislation upon the subject will be examined by the courts.

SAME.—*Change of Remedy.*—A State has the power to withdraw a remedy, and thus defeat its creditor.

PAYMENT.—*Place of can not be Changed by Debtor.*—A debtor can not change the place where he has agreed to pay off his obligation.

CONTRACT.—*Law Part of.*—*Effect of Change of Law.*—The law in force at the time a contract is made enters into and becomes a part of it; and no subsequent change of the law can affect such contract.

REPEAL OF STATUTES.—*Repealing Act Unconstitutional.*—A repeal of a statute can not be accomplished by an unconstitutional statute; and if an act

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repealing a former act is invalid, an appropriation made by such former act is not affected by such invalid act, and remains in force.

SAME.—*Effect upon Appropriation.*—A State can not invalidate its contract after it is made by repealing the statute authorizing its creation; and an attempt to annul such a contract does not affect an appropriation made in the statute authorizing the assumption of the obligation.

INTEREST.—*Liability of a State for.*—A State is not liable for interest upon its obligations unless it contracts to pay it in pursuance of a statute authorizing the contract. The general interest statute does not apply to the State.

SAME.—*Interest after Debt Due.*—*Compound Interest.*—A statute authorized the issue of bonds of the State bearing interest at the rate of five per cent. per annum, payable semi-annually. No coupons were issued for the interest. If any instalment of interest was not demanded at a certain named place before the expiration of thirteen months from the time it became due, the State had the right to pay it at its own treasury. The bonds were made payable at the end of twenty years from the time of their issue, and after twenty years the State might, at its pleasure, redeem them.

Held, that the bonds drew five per cent. interest after the expiration of the twenty years; but that interest upon (or compound) interest could not be recovered.

STATE SINKING FUND DEBT.—*Acts of 1846, 1847 and 1872.*—*Interest.*—*Failure to Demand when Bonds were Due.*—State bonds were issued in 1852 under the acts of 1846 (Acts 1846, p. 1), 1847 (Acts 1847, p. 3), authorizing the funding of the State debt, payable in the city of New York. The act of 1846 created a sinking fund for the payment of the State's indebtedness. By an act of 1872 (Acts 1872, p. 27), the sinking fund was merged in the general fund of the State, and the State agency in the city of New York, and the sinking fund commissioners, established by the act of 1846, were abolished. Previous to 1872 such commissioners had stopped the payment of interest, and had declared that no interest would be paid on the bonds issued by authority of the acts of 1846 and 1847, because of the fact that none had been demanded for several years. Before stopping the payment of interest the commissioners had published a notice of their intention to do so, as to all bonds not presented in New York at the agency by a certain named date. This action of the commissioners was ratified by the act of 1872, and the bonds and interest declared payable at the office of the State treasury. In 1865 (Acts 1865, p. 48) an appropriation was made to pay off all of the State's indebtedness. The bonds in suit were not presented for payment, nor was payment demanded, until about 1890.

Held, that the action of the sinking fund commissioners in stopping payment of interest was unauthorized; that that part of the act of 1872 ratifying such action was unconstitutional, and that such bonds drew

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it must be affirmed that a State may annul its contract, and this, as we have shown, the Constitution forbids.

There is no question in this case as to the power of the State to withdraw a remedy and thus defeat its creditor. As we have seen, the question here is whether the appropriation made by prior statutes was destroyed by the act of 1872; if it was not the remedy is unaffected, for there is no suggestion in any statute looking in the direction of a change of the rule that has so long prevailed in this State, namely, that where there is a valid claim and an effective appropriation the auditor will be compelled by mandate to draw the proper warrant. In holding, as we do, that this action will lie, we do not adjudge that a State is bound to continue a remedy or an appropriation once provided; we decide simply that where an appropriation is once effectively made it will stand until annulled by some constitutional statute, and that an enactment assuming to impair a contract of the State is not such a statute.

Courts are bound to ascertain and give effect to the legislative intention when expressed as the Constitution sanctions; but neither the courts nor the Legislature can disregard the commands of the Constitution. No enactment can carry into effect a legislative intention if it be expressed in an unconstitutional mode. The infirmity in the first section of the act of 1872 consists in assuming to do what the Legislature has no power to do. It assumes to do what can not be done without a violation of the constitutional provision forbidding the impairment of the obligation of a contract. It is, as every one knows, the duty of the judiciary to declare all enactments void which clearly infringe the provisions of the paramount law, and, in the discharge of that duty, we must adjudge that the attempt to annul the contract evidenced by the obligations of the State is utterly futile. As there is no constitutional expression of a legislative intention to abrogate the appropriation made for the payment of the State debt, there is no intention which the courts can

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carry into effect, hence there is but one thing for us to do, and that is to adjudge that the appropriation remains unannulled.

Freely granting, as we do, that it is the duty of the judiciary to ascertain and give effect to the properly expressed legislative intention, we, nevertheless, affirm that we have no right to give life and vigor to an act which the Constitution makes lifeless and powerless. If it could be granted that the courts can give life to an unconstitutional statute, then the conclusion stated in the very able argument of the counsel for the appellant would necessarily follow, but this no court can do, so that the conclusion falls to the ground. Without the premise the conclusion is absolutely foundationless.

It is, in truth, unnecessary to inquire or decide whether the act of 1872 does, or does not, make an appropriation, for, conceding that it does not, and conceding, also, that it is proper to consider the invalid provisions of that act, still, the result must be the same, for if there was no repeal of the appropriation made by former acts, that appropriation remains in full force and vigor.

The contract of the State, as we construe it, contains a promise to pay interest, and that promise, under the settled rule to which we have referred, binds the State to pay interest upon the principal sum. This disposes of the general question as to the right of the relator to interest under the contract; but the entire question is not disposed of by the principle stated, since the general rule that a State is not liable for interest unless it contracts to pay it exerts an important influence upon another phase of the question. To justly apply this general rule that a State is not liable for interest in the absence of a contract agreeing to pay it, and to ascertain whether our construction of the contract is correct, we must look to the provisions of the statute, to the language of the contract, and to the facts bearing upon the question of interest. Section 5 of the act of 1846 reads as

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follows: "The interest on the stock hereby created, shall be payable half yearly, at the city of New York on the first days of January and July of each year, commencing on the first day of July, 1847. But if the interest for any half year shall not be demanded before the expiration of thirteen months from the time the same became due, it shall only be demandable afterward, at the treasury of the State, and for the payment of the interest and the redemption of the principal as herein provided, the faith of the State is hereby solemnly pledged." The certificates show, on their face, that they were issued under the provisions of this statute, and subsequent statutes, as we have indicated, recognize the obligation to pay interest. The provision we have quoted from the act of 1847 contemplates payment of the interest upon the principal debt after the maturity of the obligations, for it provides for cases where the instalments remain unpaid for thirteen months after maturity. The act of 1846 provides that the certificates shall "be redeemable at the pleasure of the State, after twenty years." These provisions clearly express a promise to pay interest on the principal debt after maturity, and that promise is embodied in the certificates. It seems quite clear, therefore, that there is a contract binding the State to pay interest on the principal debt, and until it performs its contract that promise remains valid and enforceable.

The next question which naturally arises is, what rate of interest did the State contract to pay? The law, as we have said, is that a sovereign is bound to pay only such interest as it binds itself by contract to pay. *United States v. North Carolina*, 136 U. S. 211; *United States, ex rel., v. Bayard*, 127 U. S. 251; *United States v. Sherman*, 98 U. S. 565; *In re Gosman*, 17 Ch. D. 771. The contract of a sovereign with respect to the payment of interest is governed by a different rule from that which prevails in cases of contracts of citizens, for where there is no promise to pay interest a sovereign is exempt. We are, therefore, required to determine what rate the sov-

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ereign agreed to pay, and when that is determined the rate recoverable is ascertained and fixed. In this instance the only rate mentioned in the statutes or contract is five per centum, and no other can be recovered, since the only rate recoverable is that fixed by the contract. It is probably true that the opinion in the case of *Gray v. State, ex rel., supra*, contains some propositions not easily harmonized with the doctrine of the Supreme Court of the United States, but, however this may be, there is an essential difference between that case and the one now at our bar. One essential difference is that in this case it appears affirmatively that no coupons were issued for the interest, while in the case referred to there were coupons. Another difference is that it here appears that thirteen months elapsed without the presentation of the certificates on New York, thus giving the State the right to pay at its own treasury under the provisions of the act of 1847, and this fact exerts an important influence upon the question. Under these circumstances it seems clear that the interest recoverable is that fixed by the statutes and the contract, for the State undoubtedly had a right to declare what interest it would pay. This it did by providing that the certificates should run for twenty years at five per centum per annum interest, and that after twenty years it might, at its pleasure, redeem them. We can conceive no tenable ground upon which it can be asserted that the rate of interest increased after twenty years, for it seems clear to us that no matter how long the bonds were allowed to run the rate of interest was that fixed by the statutes and the contract. Our final conclusion upon this branch of the case is that the relator is entitled to interest on the principal sum at the rate fixed by the statutes and the contract made under them, but to no more.

The remaining question is this: Is the relator entitled to interest upon interest? The contention of his counsel is that he is not asking compound interest, but that he is asking interest upon each semi-annual instalment of interest which

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the State failed to pay. This question must be examined in the light of the rule that a sovereign State is not liable for interest except in cases where it has promised to pay interest. If there is no such promise, no liability exists. The authorities to which we have referred seem to us to be satisfactory, and to settle the question against the relator, but we have examined others and find them strongly against him. In the case of *State, ex rel., v. Board, etc.*, 36 Ohio St. 409, it was held that in the absence of a promise to pay interest none can be recovered against a State, and that a State is not within the provisions of a general statute providing for the payment of interest, in cases where money is wrongfully withheld from a creditor. The court put its decision upon the familiar rule that a sovereign is not bound by the words of a statute, unless it is expressly named, and in support of its conclusion cited these cases: *Trustee, etc., v. Campbell*, 16 Ohio St. 11; *Josselyn v. Stone*, 28 Miss. 753; *State v. Kinne*, 41 N. H. 238; *Attorney Gen'l v. Cape Fear, etc., Co.*, 2 Iredell Eq. 444; *Auditorial Board v. Arles*, 15 Texas, 72; *State v. Thompson*, 5 Eng. (Ark.) 61. In *Wightman v. United States*, 23 Ct. Cl. R. 144, the general rule was stated, and it was said: "Hence, there is no law fixing a rate of interest for all classes of the public debt, and a long established public policy has been to pay interest only where it is a subject of express agreement or of positive enactment." It was held in the case of *Tillson v. United States*, 100 U. S. 43 that a statute referring a claim did not authorize a recovery of interest in the absence of words expressly providing for the payment of interest. It is impossible to escape the effect of these authorities, and considerations may be readily suggested which increase their force. One is that there is no right to coerce the payment of a debt due from a sovereign, and, of course, a sovereign may impose limitations upon its liability. This it does when it provides for the payment of interest, since it agrees to pay that rate and no other, and, indeed, in the absence of such a provision no enforceable lia-

The State, *ex rel.* Schook, *v.* The City of New Albany.

bility would exist to pay any interest whatever. Again: Under constitutions like ours there is no enforceable liability until an appropriation is lawfully made, and an appropriation can not be construed as extending to claims which a State is not under an express contract to pay. If this be true it must also be true that an appropriation to pay the principal and interest of a bond only authorizes the payment of interest upon the principal, and not upon the interest.

We do not inquire whether an individual would, or would not, be liable for interest upon interest, as it is enough to adjudge that a sovereign State is not liable where, as here, there is no contract to pay interest upon interest.

Judgment affirmed.

Filed Feb. 6, 1891.

No. 14,760.

THE STATE, EX REL. SCHOOK, *v.* THE CITY OF NEW ALBANY.

STREET.—*Obstruction of.*—*Mandamus.*—*Pleading.*—A complaint in an action to compel a city by mandamus to remove an obstruction from an alley placed therein by a railroad company, with the consent of the city, must, in order to be sufficient, make it affirmatively to appear that an unlawful use is made of the alley.

From the Floyd Circuit Court.

J. H. Stotsenburg and E. B. Stotsenburg, for appellant.

G. A. Bicknell, for appellee.

OLDS, C. J.—This was a proceeding by the appellant for a writ of mandate against the city of New Albany to require the city to remove an obstruction from an alley adjacent to the appellant's lot.

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By agreement the complaint was treated as the alternate writ, and appellee demurred to the same for two reasons:

"1st. There is a defect of parties defendant, in this, the Pennsylvania Company is a necessary party defendant and should be joined.

"2d. The complaint does not state facts sufficient to constitute a cause of action."

The court sustained the demurrer and this ruling is assigned as error.

The complaint describes the obstruction in an enigmatical way, and alleges that such obstruction was placed in said alley by the Pennsylvania Company, with the consent and approval of the city. It alleges that it is extremely dangerous to pass along the alley on account of the constant and swift motion of large bodies of iron, steel and wood, which are constantly and rapidly moved along and upon said alley. The interpretation given the complaint by counsel for the appellant and appellee is, that it charges that the Pennsylvania Company, with the consent of the city, located a railroad upon and along said alley, and that the large bodies of iron, steel and wood moving through and along said alley are locomotives, engines and cars of the company. This interpretation of the complaint is warranted by the language used, and it is conceded, in effect, that the alley is used for railroad purposes, and the allegations of the complaint show that the Pennsylvania Company occupy and use the alley with the consent and approval of the city. The presumption is that the city gave its consent and approval to use the street for lawful purposes, and if mandate will lie to compel the removal of an obstruction from the street, it will only be done when it is made to affirmatively appear that an unlawful use is made of the street or alley. The allegations of the complaint, when taken as a whole, are so obscure and uncertain that it can not be said to affirmatively appear from it that there is an unlawful use made of the street. The allegations of the complaint are such that it may in-

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tend to charge, and may be construed as charging, that the Pennsylvania Company has, with the consent and approval of the city, located its railroad along and upon the alley. The charge is a very peculiar one, and is not sufficient to rebut the presumption of the lawful use of the streets and alleys by the city. The city would have the right to permit the use of the alley for railroad purposes. Railroad tracks are constructed of iron, steel and wood, and so are the cars, and the complaint charges that by reason of the constant and swift motion of large bodies of iron, steel and wood, which are constantly and rapidly moved along and upon said alley, it is dangerous for persons to pass along and upon it. To constitute a good complaint for a mandate, in a case like this, the facts must be plainly stated showing clearly an unlawful use of the street. This complaint is too uncertain and obscure in its description of the obstruction to withstand a demurrer, and the court did not err in its rulings.

Judgment affirmed, with costs.

Filed. Feb 6, 1891.

No 15,945.

McCARTY v. THE STATE.

SUPREME COURT.—*Weight of Evidence.*—Unless there is an absolute failure of evidence on some material point this court will not disturb the verdict of the jury on the weight of the evidence.

CRIMINAL LAW.—*Robbery.*—*Indictment.*—*Evidence.*—Under an indictment charging the taking of ten dollars in money it is not necessary to prove its value, as money is the measure of values.

From the Clinton Circuit Court.

W. A. Staley and W. R. Moore, for appellant.

J. Combs, Prosecuting Attorney, and D. S. Holman, for the State.

127	223
131	304
132	542
127	223
137	476
139	533
127	223
148	327
127	223
155	701
127	223
167	600
127	223
170	632

McCarty v. The State.

McBRIDE, J.—Appellant was convicted of the crime of robbery and sentenced to two years' imprisonment in the State Prison.

The only question here is upon the sufficiency of the evidence to sustain the conviction.

On the evening of the alleged robbery the prosecuting witness, whose name was Sholder, started to enter a certain saloon in the city of Frankfort by way of the rear door, and through an alley. He had at the time, in one of his pockets, a \$10 bill. In the alley he met the appellant, with whom he had no acquaintance. Appellant accosted him, and asked him to go with him to a country dance. Sholder refused. Appellant then asked him if he was "going to set 'em up?" To this Sholder answered, "No." Thereupon appellant struck him in the face with a brickbat or a stone. The blow knocked him down and rendered him unconscious. When he regained consciousness he got up and went out on the street, where he found an acquaintance, who accompanied him back to the alley, when they found McCarty, the appellant.

Sholder first said he did not know who hurt him, but on seeing McCarty inquired what his name was and said he was the man who struck him. This McCarty denied. Sholder then went to the mayor's office and thence to the saloon which he was about to enter when he was struck. Here his face was washed and his wounds dressed, and he then discovered that the pocket which had contained the \$10 bill was torn, ripped or cut open, and the money, a ten dollar "greenback," was gone. The defendant left Frankfort that night and went to Lebanon, where he was soon after arrested. There was no dispute or conflict in the testimony. The accused offered no testimony whatever, and did not even testify in his own behalf.

The rule has long been settled in this court that in criminal, as well as in civil causes, verdicts will not be disturbed merely on the weight of the evidence. When the evidence tends to sustain the verdict on every material point the

McCart v. The State.

court will not disturb the conclusion reached by the trial court and jury.

There must be an absolute failure of evidence on some material point or this court will not interfere on that ground alone. *Ard v. State*, 114 Ind. 542; *Wachstetter v. State*, 99 Ind. 290; *Hudson v. State*, 107 Ind. 372; *Ritter v. State*, 111 Ind. 324; *Trout v. State*, 111 Ind. 499; *Kleespies v. State*, 106 Ind. 383; *Dolke v. State*, 99 Ind. 229; *Murphy v. State*, 97 Ind. 579; *Clayton v. State*, 100 Ind. 201; *Garrett v. State*, 109 Ind. 527.

If we were disposed to question the correctness of this rule of practice we could not feel at liberty to do so in view of the long line of precedents running far back of any of the cases above cited. We, however, not only feel constrained to follow the rule because thus established by authority, but because we feel it to be the only safe rule in such cases. We have read the testimony carefully, and while, as it comes to us through the bill of exceptions, with none of the witnesses or actors before us, it does seem to lack in certainty and weight on certain points, it does, by fact or fair inference, tend, on every material matter, to sustain the verdict of the jury and action of the trial court in overruling the motion for a new trial. To them was intrusted the duty of weighing the evidence, and we can not, under the rule above referred to, reverse their decision.

Appellant insists that the judgment should be reversed because the State did not prove the value of the property taken from the prosecuting witness. The indictment charged the taking of ten dollars in money. This was sufficient under the statute. Section 1750, R. S. 1881; *Graves v. State*, 121 Ind. 357. The proof was that it was ten dollars in money. No proof was necessary as to its value, money being the measure of values.

The judgment is affirmed.

Filed Feb. 6, 1891.

VOL. 127.—15

Chandler *et al.* v. Scott.

No. 14,394.

CHANDLER ET AL. v. SCOTT.

CHATTTEL MORTGAGE.—Failure of Recorder to Spread Upon Record.—Innocent Purchaser.—Where a mortgage, entitled to be recorded, is left with the recorder of the proper county for the purpose of being recorded, and is not withdrawn until the mortgagee, in good faith, believes it to be recorded, the title of the mortgagee will be protected and the consequences of the failure to spread upon the record will be thrown upon the recorder in case damage ensues to an innocent purchaser who exercised due care.

From the Decatur Circuit Court.

D. A. Myers, A. P. Stanton and J. E. Scott, for appellants.

J. K. Ewing and C. Ewing, for appellee.

PER CURIAM.—This opinion was prepared by the late Justice MITCHELL, and expresses the views and judgment of the court.

William Runyan executed a chattel mortgage to Chandler & Taylor on the 13th day of August, 1884, to secure a debt owing by him and another to the mortgagees above named. Within ten days the mortgagees left the mortgage at the office of the proper recorder for the purpose of having it recorded, at the same time paying the recorder the compensation fixed for recording the instrument. The recorder afterwards endorsed on the back of the mortgage a memorandum duly signed, as follows: "Received for record August 19, at 8 o'clock, A. M., and recorded in chattel mortgage record No. 4, pages — —."

The instrument was returned to the mortgagees, who received it, supposing it to have been duly recorded; but by an oversight the recorder omitted to spread it upon the record. The mortgagor subsequently sold the property described in the mortgage to Scott, who purchased for value, without actual notice of the mortgage.

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After the purchase by Scott the recorder, having discovered that he had omitted by mistake to record the mortgage, requested the mortgagees to return it to him, which they did, and it was then spread upon the record without any request from the mortgagees.

The question is, whether upon the foregoing facts the mortgage was to be deemed as recorded prior to the purchase by the appellees, so as to affect them with notice.

By the terms of section 4913, R. S. 1881, assignments of goods by way of mortgage, where the goods assigned are not delivered, are invalid as against any other person than the parties thereto, unless the assignment or mortgage shall be duly acknowledged and recorded in the recorder's office of the county where the mortgagor resides, within ten days after the execution thereof. Section 4914, R. S. 1881, reads as follows: "Every such mortgage shall be considered as recorded from the time it shall be left at the proper recorder's office for that purpose."

It was expressly ruled in *Holman v. Doran*, 56 Ind. 358, that "the provision of law, that such a mortgage as the one under consideration shall be 'considered as recorded,' when it has been 'left at the proper recorder's office for that purpose,' makes the act of leaving the mortgage for record at the proper recorder's office, fully the equivalent of the record of such mortgage."

Statutes similar to that upon which the above decision was based exist in other States. In the State of Ohio the statute provided that a mortgage upon real estate "shall take effect and have preference from the time the same is delivered to the recorder of the proper county, to be by him entered of record."

It was held that where a mortgage was delivered as above the statute was satisfied, and the land effectually conveyed or incumbered. *Tousley v. Tousley*, 5 Ohio St. 78; *Magee v. Beatty*, 8 Ohio, 396. So, under a statute similar in effect in force in the State of Pennsylvania, it is said in *Brooke's*

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Appeal, 64 Pa. St. 127 : "A regular mortgage entitled to record is a record the moment it is left for record, and so continues for all time to come." *Musser v. Hyde*, 2 W. & S. 314. In like manner it has been held in Illinois that filing a deed for record with the recorder of the proper county, is all that is required to make it effectual as notice to subsequent purchasers, even though the recorder fails to record it, or enter it in his entry book. *Craig v. Dimock*, 47 Ill. 308; *Polk v. Cosgrove*, 4 Biss. 437; *People v. Bristol*, 35 Mich. 28; *Gorham v. Summers*, 25 Minn. 81; *Turner v. McFee*, 61 Ala. 468. So, also, it has been held in Kentucky, that a deed lodged with the proper recorder for record takes effect from the time it is filed, and not from the time it is actually copied into the recorder's book. *Breckinridges v. Todd*, 3 T. B. Monroe, 52 (16 Am. Dec. 83); *Herman Chat. Mort.*, section 78; *Jones Chat. Mort.*, 270, 272.

A chattel mortgage must, therefore, under the statute, be considered as recorded, to all intents and purposes, from the time it is deposited with the proper officer for record, and thereafter it imparts constructive notice to the same extent as if actually spread upon the record. *Jordan v. Farnsworth*, 15 Gray, 517; *Fairbanks v. Davis*, 50 Vt. 251; 3 Am. and Eng. Encyc. of Law, 193, 194.

Registry acts are statutory devices designed to perform the office of an actual delivery of the property mortgaged to the mortgagee. When a mortgagee fairly complies with the statute he is entitled to its protection as much as if he had taken actual possession of the property.

Merely leaving the mortgage with the recorder is not sufficient. Nor is it to be deemed recorded if, after leaving it for record, it be withdrawn with knowledge that it has not been recorded; but if a mortgage, entitled to be recorded, be left with the recorder of the proper county for the purpose of being recorded, and is not withdrawn until the mortgagee, in good faith, believes it to be recorded, the title of the latter will be protected, and the consequences of the fail-

Buckner v. Spaulding.

ure to spread upon the record will be thrown upon the recorder, in case damage ensues to an innocent purchaser who exercised due care.

The court erred in overruling the appellants' motion for a new trial.

Judgment reversed, with costs.

Filed Feb. 7, 1891.

No. 14,770.

BUCKNER v. SPAULDING.

SLANDER.—*Pleading.*—*Answer.*—In an action for slander in charging the plaintiff with adultery with one man, an answer which alleges that she was guilty of adultery with another man, is bad.

BILL OF EXCEPTIONS.—*Time of Filing.*—Where the record shows that the bill of exceptions was not filed within the time allowed by the court, and it does not appear in the body of the bill when it was presented, the bill will not be regarded as properly in the record.

From the Greene Circuit Court.

A. G. Cavins, E. H. C. Cavins and W. S. Cavins, for appellant.

J. S. Bays, W. W. Moffett and C. E. Davis, for appellee.

ELLIOTT, J.—The complaint alleges that the defendant, here the appellant, slandered the plaintiff by falsely charging her with adultery with one Williams. The answer is, in substance, that the plaintiff did have sexual intercourse with one Ploder. The answer is so clearly bad that discussion is unnecessary. *Hallowell v. Guntle*, 82 Ind. 554; *Ricket v. Stanley*, 6 Blackf. 169. It is no answer to a slanderous charge that the plaintiff was guilty of a specific act of adultery with one man to allege that she was guilty of a specific act of adultery with another man.

The record shows that the bill of exceptions was not filed

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within the time allowed by the court, and it does not appear in the body of the bill when it was presented to the judge. The bill can not be regarded as properly in the record. *City of Plymouth v. Fields*, 125 Ind. 323; *Rigler v. Rigler*, 120 Ind. 431; *Buchart v. Burger*, 115 Ind. 123.

Judgment affirmed.

Filed Feb. 7, 1891.

No. 14,664.

McCORMICK v. SMITH.

127 230
159 619
127 230
166 702

DEPOSITION.—*Suppression of Part of Answer.*—The suppression of a part of a witness's answer to a question propounded to him in taking a deposition, which has the effect of completely destroying his answer thereto, is error.

FRAUDULENT CONVEYANCE.—*Trustee.*—*Lien of Judgment.*—*Proof of Consideration.*—*Assumption of Debt by Grantee.*—*Preference of Creditors.*—W. was indebted to M. who was in failing circumstances, and said M. was indebted to A., G., B., T., L., I. and others. I. had a judgment against M. on his debt. W. conveyed a tract of land to A., in consideration of A. paying W.'s debt to M. and assuming the debts of G., B., T. and L., and cancelling his own debt against M. M. assented to this arrangement.

Held, that it was error to refuse to allow W., after having fully testified to the arrangement, on cross-examination, to testify that part of the consideration was the assuming of M.'s debts to G., T. and others.

Held, also, that it was not error to allow him to testify on cross-examination that M. desired to pay his debts; that he was willing to agree to any arrangement to pay them off; that he, W., after seeing M., went to A. and A. agreed to take the tract at the price named by W. in payment of his debt from M., and that M. agreed to pay certain other of A.'s debts due to G., T. and others.

Held, also, that A. was not a trustee for W.; that I.'s judgment was not a lien on the land conveyed; that a sale of such land upon execution issued on said judgment was void, if the transaction was entered into and carried out in good faith; that it made no difference how A. paid L., G., B. and T., and that I. could not object on the ground that he was not a preferred creditor.

From the Daviess Circuit Court.

McCormick *v.* Smith.

W. R. Gardiner and S. H. Taylor, for appellant.
A. J. Padgett and A. Paget, for appellee.

BERKSHIRE, J.—This was an action to recover real estate and to quiet title to the same.

The appellee answered the same by general denial and filed a cross-complaint, which was answered by the appellant with a general denial.

The issues were submitted to a jury and a verdict returned for the appellee.

A motion for a new trial was overruled and an exception reserved and judgment rendered for the appellee.

The only available specification found in the assignment of error calls in question the ruling of the court in overruling the motion for a new trial. But counsel for the appellee contend that owing to the condition of the record the questions which we shall hereafter consider are not properly in the record. We have examined the record carefully and think that counsel's contention is not well grounded.

There are several reasons for a new trial, but we do not regard it as necessary to consider all of them. Such as relate to certain instructions refused, and to the suppression of certain parts of the deposition of one Wilson, will suffice. We may consider the reasons to which we refer in the inverse order in which we have stated them.

The question at issue between the parties involves the *bona fides* of a certain conveyance made by Wilson, whose deposition we have referred to, to the appellant.

Wilson held title to the real estate and conveyed it to the appellant in payment of an indebtedness which he owed to one Isaac W. McCormick. One Jesse A. Mitchell held a judgment, rendered in the Daviess Circuit Court, against the said Isaac W. McCormick, and after the real estate had been conveyed to the appellant he, without execution on his judgment, caused the real estate to be levied upon and sold by the sheriff of Daviess county as the property of the said

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Isaac W. McCormick. The appellee became the purchaser at the sheriff's sale, and after the year of redemption had expired he received a conveyance from the sheriff.

The theory of the appellee is, that as Isaac W. McCormick paid the consideration to Wilson for the conveyance the appellant held the title in trust for the said Isaac W. McCormick and in fraud of his creditors; while the contention of the appellant is, that the arrangement was that the conveyance should be made to him by Wilson in payment of Wilson's debt to Isaac W. McCormick, and that the appellant would release a certain indebtedness which Isaac W. McCormick owed to him, and pay certain other creditors agreed upon of the said Isaac W. McCormick, in sums sufficient to aggregate the amount of the Wilson indebtedness, and that the transaction was in good faith.

The deposition of Wilson, referred to above, was taken on the part of the appellee, and counsel for the appellant appeared and cross-examined the witness. The part of the deposition suppressed relates to the cross-examination. In the examination in chief the appellee examined Wilson fully as to the transaction and consideration, and among other questions which he asked him was:

"What consideration passed between you and Crawford McCormick when you deeded those lots to him?"

The witness answered: "I sold those lots to Crawford McCormick to pay a debt I owed to Isaac McCormick, and a debt Isaac McCormick owed to Crawford McCormick. Crawford McCormick was to pay some debts Isaac McCormick owed to some other parties. Mr. Thomas Graham and Samuel H. Taylor were two of the parties, and perhaps others whose names I do not remember."

On cross-examination the following questions were propounded to the witness, and the following answers given by him:

"27. If the deed of these lots to Crawford McCormick was made, as you state, in payment of your indebtedness to

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Isaac McCormick, state why you made the deed to Crawford McCormick instead of Isaac McCormick."

"Isaac McCormick wanted to pay his debts, and any arrangement that I could make to pay any of his debts was all right with him. Then I went to Crawford McCormick and he agreed to take the lots at the price I offered them at in payment of a debt that Isaac owed him; Crawford McCormick also agreed to pay certain other debts from Isaac McCormick to Graham and Taylor, and perhaps others in payment of that deed to him."

"28. From whom, and in what manner did you learn of Isaac McCormick's indebtedness to Crawford McCormick and the other parties named?"

"I learned it from Graham and Taylor, and from Crawford McCormick and from Isaac McCormick; I knew it from what those parties told me at the time."

"29. Did you converse freely with the parties concerning the making of the deed, and was this the understanding upon which the deed was made?"

"Yes, sir."

We are of the opinion that these questions and answers were germane to the examination in chief, and that neither the form of the questions nor the language of the answers is objectionable, belonging, as they do, to the cross-examination of the witness.

The court suppressed the following part of the answer of the witness to question "27:" "Also agreed to pay certain other debts from Isaac McCormick to Graham and Taylor, and perhaps others in payment of that deed to him."

The answer of the witness as read to the jury after the ruling of the court suppressing the part thereof above was: "Isaac McCormick wanted to pay his debts, and any arrangement that I could make to pay any of his debts was all right with him. Then I went to Crawford McCormick and he agreed to take the lots at the price I offered them at in payment of a debt that Isaac owed him, Crawford McCormick."

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The evidence in the case discloses that the debt claimed to be due to Crawford McCormick was \$690.

This ruling of the court not only did great injustice to the witness, but was highly injurious to the appellant. The deposition, as read to the jury, makes the witness say that the appellant agreed to take the real estate at the price of \$2,500 in payment of a debt of \$690. A transaction like the one disclosed by the said answer after the court had suppressed the part thereof to which we have called attention, would bear the impress of unfairness on its very face, and when considered with the other evidence in the case introduced by the appellee, it is not surprising that the jury returned the verdict they did. Besides, the ruling of the court destroyed the answer which the witness gave, so that the answer purporting to come from the witness, as read to the jury, was in no sense his answer, but a substitute therefor brought about by the ruling of the court.

The witness testified that the appellant paid \$2,500 for the real estate in controversy, while the court's ruling make him say that but \$650 was paid.

If the part of the answer which the court struck out was properly struck out it destroyed the entire answer to the question, and the whole of it should have been stricken out. But we are inclined to think the entire answer was proper, and that no part of it should have been stricken out. It simply stated the consideration, and in what it consisted. We think questions "28" and "29," and the answers thereto, were competent.

In the answer to question 28 the witness states the source of his information, and that he derived it from the parties interested at the time of the transaction.

By question "29," and the answer thereto, the witness answers that he had conversed with the parties freely concerning the deed, and that it was made with the understanding that the appellant should pay \$2,500 for the real estate in the manner indicated in former answers.

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We do not think the answer of the witness was the statement of a conclusion, but of a fact, after the circumstances had all been detailed by him relating to the transaction.

The appellant asked, at the proper time, that certain instructions which his counsel had prepared be given to the jury.

The 7th instruction was as follows:

"If you find from the evidence that at the time of the conveyance from Wilson he was indebted to Isaac W. McCormick and that Isaac W. McCormick was at the same time in failing circumstances, and was indebted to his half-brother, the plaintiff, and to Thomas B. Graham, Jesse W. Burton, Samuel H. Taylor, Dr. William Lemon, Jesse A. Mitchell and others, and that Mitchell had a judgment against said Isaac on his debt, then, under such circumstances, Wilson, Isaac W. McCormick and plaintiff would have had the legal right to enter into an arrangement by which Wilson should convey the real estate to plaintiff in payment of his debt to Isaac W. McCormick, and that the plaintiff should take the same in payment of his own claim and assume the debts of Lemon, Graham, Burton and Taylor, provided it was done in good faith on the part of Isaac W. McCormick and plaintiff with intent to pay and discharge the debts due from Isaac to plaintiffs, Graham, Lemon, Taylor and Burton, notwithstanding Mitchell and any other creditors of Isaac there might have been were not able to collect their debts.

"8. And if you find that such arrangement as is stated in the foregoing instructions was entered into and carried out by the parties thereto in good faith, then it would make no difference how plaintiffs paid off Lemon, Graham, Burton and Taylor, and in such case you should find for the plaintiff."

These instructions, we think, stated the law correctly and were very pertinent to the evidence, and hence should have been given or their equivalent.

Isaac W. McCormick had the right to prefer some of his

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creditors to the exclusion of others. The law in this particular is too well settled to require the citation of authorities; indeed, the trial court recognizes this rule in the instructions which it prepared and gave to the jury. But the instructions which the court gave were general in their character, and the appellant, upon request made to the court at the proper time, was entitled to a specific application of the rule to his evidence introduced to support his theory of the case.

As to the manner in which the appellant paid and satisfied the indebtedness assumed by him, whether by conveying part of the real estate or otherwise, was wholly immaterial to the other creditors if the conveyance was made to the appellant in good faith.

We think the court erred in suppressing the parts of the deposition to which we have called attention, and in refusing to give the said instructions.

Other questions discussed may not arise again and need not be considered.

Judgment reversed, with costs.

Filed Feb. 6, 1891.

No. 14,752.

**THE INDIANAPOLIS AND ST. LOUIS RAILWAY COMPANY
v. HOWERTON.**

COMMON CARRIER.—Ejection of Passenger.—Damages.—The plaintiff, a boy of 16, became a passenger on the defendant's train, and gave the conductor his ticket. Afterwards the conductor again demanded a ticket, and refusing to believe the plaintiff's statement that he had given him a ticket demanded fare. The plaintiff gave the conductor ten cents, all the money he had. The conductor accepted the money, but ordered the boy to get off the cars before reaching his destination, which he did, being thereby compelled to walk the remainder of the distance.

Held, that damages in the sum of \$195 were not excessive.

From the Hendricks Circuit Court.

The Indianapolis and St. Louis Railway Company v. Howerton.

J. T. Dye and W. H. Dye, for appellant.

J. V. Hadley, for appellee.

OLDS, C. J.—This is an action by the appellee against the appellant for damages for ejecting the appellee from a passenger train, he having delivered to the conductor a ticket entitling him to ride upon the train.

There was a trial had resulting in a verdict and judgment in favor of the appellee for the sum of one hundred and ninety-five dollars.

Appellant asks that the judgment be reversed, for the reasons: 1st. That the verdict is not sustained by the evidence. 2d. That the damages are excessive, and 3d. That the court erred in refusing to give the instructions asked by the appellant.

The evidence tends to show that the appellee, who was permitted by the court to prosecute this action as a poor person, was sixteen years of age at the time of the happening of the grievances complained of; that he entered the car at Danville to ride to Reno, and delivered to the conductor a ticket entitling him to passage from Danville to Reno, and the conductor accepted it; that afterwards the conductor accosted him and again demanded a ticket. The appellee told the conductor that he had given him his ticket. This the conductor denied and demanded fare. The appellee having but ten cents gave it to the conductor and the conductor accepted it and commanded him to get off the car at Hadley before reaching Reno, and the appellee, in obedience to the command of the conductor, got off the train, and brings this suit for damages.

The evidence fully sustains the verdict. The damages are not excessive.

The appellee, a mere boy, bought a ticket and took the train in the usual way and gave his ticket to the conductor who accepted it. He was branded in the presence of the other passengers with attempting to ride without paying fare,

The Board of Commissioners of Marshall County *v.* Johnson.

and when he told the conductor the truth as to having given him a ticket his word was disputed and fare again demanded; he then gave to the conductor all the money he had; true, it was a small sum, ten cents, yet it was all he had, and was commanded and required to get off the train before reaching his destination, and compelled to walk the remainder of the distance. Under this state of facts we can not disturb the verdict on the grounds that it is excessive. This is not a mere breach of the contract, but it is a tort. *Cincinnati, etc., R. R. Co. v. Eaton*, 94 Ind. 474.

There is no discussion of the question relating to the refusal to give the instructions requested.

There is no error in the record.

Judgment affirmed, with costs.

Filed Feb. 7, 1891.

127	238
131	374
127	238
158	534
127	238
160	629

No. 14,745.

THE BOARD OF COMMISSIONERS OF MARSHALL COUNTY
v. JOHNSON.

COUNTY AUDITOR.—*Fees.*—A county auditor can recover only such compensation as the statute allows him, and he is not entitled to recover compensation for duties performed by him except where the statute so provides, although the services may be regarded by him and by the board of commissioners as "extra services," entitling him to "extra" compensation.

From the Marshall Circuit Court.

A. C. Capron and H. Corbin, for appellant.

J. D. McLaren and E. C. Martindale, for appellee.

ELLIOTT, J.—We do not deem it necessary in this case to notice the questions of practice discussed by counsel, for we think it entirely clear that, upon the facts disclosed in the special finding, the judgment must be reversed.

The Board of Commissioners of Marshall County v. Johnson.

It is well settled that a county auditor can recover only such compensation as the statute allows him, and that he is not entitled to recover compensation for duties performed by him except where the statute so provides, although the services may be regarded by him and by the board of commissioners as "extra services" entitling him to "extra" compensation. We have so often discussed this general question that we decline to again discuss it. *Board, etc., v. Barnes*, 123 Ind. 403; *Williams v. Segur*, 106 Ind. 368; *Board, etc., v. Gresham*, 101 Ind. 53; *Noble v. Board, etc.*, 101 Ind. 127; *Board, etc., v. Harman*, 101 Ind. 551; *Wright v. Board, etc.*, 98 Ind. 88; *Donaldson v. Board, etc.*, 92 Ind. 80; *Nowles v. Board, etc.*, 86 Ind. 179. For many years the General Assembly has clearly and unequivocally declared its policy to be that no constructive fees shall be allowed upon any pretext to county officers, and this court has uniformly given full effect to that policy. Many of the items allowed the appellee were allowed in direct violation of the words as well as the spirit of the statute, and the finding can not possibly be sustained.

We do not enter upon any discussion of the effect of former decisions of the board of commissioners, for the reason that no such question is presented by the record. It is only proper for us now, in view of the condition in which the record comes to us, to adjudge that many of the items of the appellee's claim are illegal.

Judgment reversed, with instructions to grant a new trial, and to proceed in accordance with this opinion.

Filed Feb. 18, 1891.

Brumbaugh v. Richcreek et al.

7 940
9 577
7 240
1 544
3 206
7 240
7 586

7 240
8 205

No. 14,777.

BRUMBAUGH v. RICHCREEK ET AL.

FRAUDULENT CONVEYANCE.—*Action to Set Aside.*—*Pleading.*—*Necessary Averments.*—In a suit by a creditor to set aside a conveyance of property on the ground that it was made to defraud creditors, an averment that at the time the suit was brought the debtor had no property out of which the debt might be collected, or an averment equivalent thereto, is material and necessary, and its omission is fatal.

SAME.—*Debtor's Unsoundness of Mind.*—*Advantage Taken of by Grantee.*—A creditor can not avoid a conveyance made by his debtor solely because the debtor was of unsound mind when he made it. Nor does the fact that the grantee, knowing of the debt and of the debtor's mental weakness, took advantage of such weakness for the purpose and with the intention of thereby defrauding the creditor, authorize the creditor to appeal to a court of equity to set aside such deed, unless he is injured thereby.

From the Kosciusko Circuit Court.

I. H. Hall, E. Haymond and L. W. Royse, for appellant.
S. J. North and H. S. Briggs, for appellees.

MCBRIDE, J.—This was a suit by Rachel Richcreek, the appellee, to set aside an alleged fraudulent conveyance of land.

The appellee was a judgment creditor of Susan Brumbaugh, who had conveyed certain lands to appellant, and appellee insisted that the conveyances were made by said Susan and received by appellant for the sole purpose of preventing the collection of her claim.

The complaint is in two paragraphs, and the circuit court overruled a separate demurrer to each paragraph. Appellant excepted, and this ruling is assigned as error.

In the first paragraph of the complaint it is alleged, in substance, that, on the 24th day of October, 1885, said Susan, "contriving to cheat, hinder, delay and defraud plaintiff out of her said debt," conveyed a portion of said land to appellant, and afterwards, on the 1st day of April, 1887, "the more effectually to place said Susan in a situation to defeat

Brumbaugh *v.* Richcreek *et al.*

the collection of plaintiff's claim, and to cheat and defraud plaintiff out of her said claim," conveyed to appellant the residue of said land, and that such conveyances were voluntary and without consideration, that appellant had knowledge of said indebtedness and of said fraudulent purpose, and that said conveyances left said Susan "with no property whatever subject to execution."

In the second paragraph it is alleged that said Susan was "of weak and infirm mind, and wholly incapable of making any contracts or transacting any business for herself," and that appellant, "having knowledge of her indebtedness to plaintiff, and also having full knowledge of her mental incapacity, and purposing and intending to cheat and defraud plaintiff out of her debt, and to prevent it being made out of the property of said Susan," procured and induced her to convey the land to him, which she did at the time indicated in the first paragraph, without any consideration whatever, "leaving said Susan without any property whatever subject to execution."

There is no averment in either paragraph of the complaint that at the time of the commencement of the suit the debtor had no property out of which the debt might have been collected, nor is there any equivalent averment.

This suit was commenced October 10th, 1887, while, as above shown, the last deed was made April 1st, 1887, and the only averment occurring in either paragraph with reference to what, if any, property she had remaining, is that quoted above, that when the deed of April 1st, 1887, was made, it left her "without any property subject to execution."

In a suit by a creditor to set aside a conveyance of property on the ground that it was made to defraud creditors, an averment that at the time the suit was brought the debtor had no property out of which the debt might be collected, or an averment equivalent thereto, is material and necessary,

Brumbaugh v. Richcreek et al.

and its omission is fatal. *Bruker v. Kelsey*, 72 Ind. 51; *Sherman v. Hogland*, 73 Ind. 472; *McCole v. Loehr*, 79 Ind. 430; *Bishop v. State, ex rel.*, 83 Ind. 67; *Taylor v. Johnson*, 113 Ind. 164; *Adams v. Slate*, 87 Ind. 573.

A creditor is not authorized to interfere with any disposition which his debtor may make of his property so long as he is not injured thereby. The debtor may convey his property with the intention of defrauding his creditor, but if he still retains property subject to execution out of which the debt may be collected, the debtor can not complain. So, also, if the debtor conveys all of his property with like fraudulent purpose, retaining nothing, but when the creditor seeks to collect the debt of him he has acquired and then has property subject to execution from which the claim can be made, the creditor has no ground for interfering with the fraudulent conveyance. The averments in the second paragraph that the debtor was of unsound mind when she made the conveyances do not affect the question. The contracts of a person of unsound mind, not under guardianship, or whose mental unsoundness has not been judicially determined, are voidable, but are not void. A creditor, however, can not avoid a conveyance made by his debtor solely because the debtor was of unsound mind when he made it. Nor does the fact that the grantee, knowing of the debt and of the debtor's mental weakness, took advantage of such weakness for the purpose and with the intention of thereby defrauding the creditor, authorize the creditor to appeal to a court of equity to set aside such deed unless he is injured thereby.

Both paragraphs of the complaint are fatally defective, and the demurrer should have been sustained to each paragraph.

It is due to the court below to say that while the question here involved is fairly in the record by demurrer and exception, it was probably never in fact presented or argued. This seems to be clearly indicated by the special findings, which show that evidence was heard, and the court found the existence of the facts which ought to have been averred and

Ramey v. The State, *ex rel.* Stryker.

were not. This, however, does not cure the error, as the appellants may say, we only called witnesses to meet the facts charged, and could not anticipate that the court would hear evidence on facts not put in issue. The court can not say, if the fact had been put in issue, that appellants might not have met it successfully with proof.

Judgment reversed, with direction to the circuit court to proceed in accordance with this opinion.

OLDS, J., took no part in the decision of this case.

Filed Feb. 18, 1891.

127 248
129 556

No. 14,792.

RAMEY v. THE STATE, EX REL. STRYKER.

BASTARDY.—*Evidence.*—In a prosecution for bastardy the relatrix may properly be permitted to testify to repeated acts of sexual intercourse with the defendant prior to the time of the alleged conception, as tending to show the relations existing between the parties.

SAME.—*Declarations.*—Where, in such case, the defendant, to impeach the relatrix, introduces in evidence statements of the relatrix that the defendant was not the father of the child, her statements that he was the father of the child, made about the same time, are admissible.

From the Carroll Circuit Court.

J. Applegate and C. R. Pollard, for appellant.

L. D. Boyd and R. C. Pollard, for appellee.

OLDS, C. J.—This is a prosecution by the appellee against the appellant for bastardy.

But two questions are presented for which a reversal of the judgment is asked. First, for the reason that the relatrix was permitted to testify, over the objection of appellant, that she had had sexual intercourse with appellant at other times than that which she claims resulted in pregnancy.

Ramey v. The State, *ex rel.* Stryker.

Second, that relatrix's witnesses were permitted to testify as to statements made by relatrix out of court previous to the trial and in the absence of appellant, as to the paternity of the child.

As to the first question, the relatrix testified to repeated acts of sexual intercourse with appellant commencing several months previous to the time when she contended conception took place. The appellant denied ever having intercourse with her. There was no error in admitting this testimony. It was proper to show the relations existing between these parties, their acquaintance and their intimacy of whatever character it was. In showing the relationship existing between the parties it was proper to show, if such was the fact, that repeated acts of sexual intercourse had taken place between them prior to the time of the alleged conception. Such evidence had a tendency to show the probability of intercourse having taken place at subsequent times when opportunities offered. *State v. Markins*, 95 Ind. 464.

Nor was there any error in admitting the other testimony. The appellant had offered evidence tending to show that the relatrix had made statements out of court denying that the appellant was the father of the child. Appellant offered in evidence an affidavit of himself stating that she had made such statements to other persons, and to avoid a continuance the appellee had made an admission as to the truth of the statements in the affidavit, and the affidavit was offered and read in evidence. These statements of the relatrix were only competent as impeaching evidence. She is not the party to the suit, so that her admissions can be given in evidence. *Houser v. State, ex rel.*, 93 Ind. 228. Appellant having put her statements that appellant was not the father of the child in evidence as impeaching evidence, she had the right to put in evidence her self-serving statements made about the same time. This, we think, is in harmony with the holdings of

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this court. *Dodd v. Moore*, 92 Ind. 397; *Carter v. Carter*, 79 Ind. 466; *Brookbank v. State, ex rel.*, 55 Ind. 169.

There is no error in the record.

Judgment affirmed, with costs.

Filed Feb. 17, 1891.

127	245
120	24
130	32
127	245
163	115

—◆—
No. 14,728.

HARDING ET AL. v. COWGAR ET AL.

EASEMENT.—Right of Way.—Obstruction.—Suit to Enjoin.—Pleading.—A complaint in a suit to enjoin the obstruction of a private way which bases the right of the plaintiffs to the way on two grounds, a right of necessity and a right by prescription, states but a single cause of action, as the cause of action rests upon the threatened obstruction.

SAME.—Pleading.—Complaint.—Such a complaint, alleging that the way claimed is a well-defined road, thirty feet wide, which had been in use for more than twenty years, and was then open and in use, is sufficiently specific without setting out the beginning, course and termini of the way.

SAME.—Prescription.—In a suit to enjoin the obstruction of a private way a complaint which alleges that about fifty years prior to the commencement of the suit J. was the owner of the land described in the complaint; that he conveyed the land owned by the plaintiffs to R., through whom they claim; that J. afterwards conveyed the land owned by the defendants; and that for more than twenty years the plaintiffs and their grantors have enjoyed, as of right, and without interruption, a way over the land of the defendants, shows a right of way by prescription.

SAME.—Public Highway.—Obstruction of.—Abutting Owner.—Injunction.—Where land is so situated with reference to a public highway that such highway is necessary to ingress and egress to and from such land, the owner has a private easement in the public highway, and may maintain an action for its obstruction.

SAME.—Complaint.—Necessary Averment.—To maintain an action to enjoin the obstruction of such public highway it should be described in the complaint as a public highway.

PLEADING.—General Denial.—Demurrer.—Harmless Error.—When the general denial is pleaded no available error is committed by sustaining a demurrer to another answer which sets up such facts only as are admissible in evidence under the general denial.

SAME.—Partial Defence.—A pleading purporting to answer the whole com-

Harding et al. v. Cowgar et al.

plaint, and the matters therein pleaded, amounting to a partial defence only, is bad on demurrer.

From the White Circuit Court.

R. Gregory, for appellants.

T. F. Palmer, A. K. Sills, A. W. Reynolds and E. B. Sellers, for appellees.

COFFEY, J.—This was a suit by the appellees against the appellants to enjoin the obstruction of an alleged private way.

The complaint alleges, in substance, that the appellees are the owners in fee of a certain described tract of land in White county, Indiana ; that they reside upon said land, and have built, use, and occupy houses and barns thereon, and cultivate said land, and raise crops thereon for the general market ; that their nearest and only available market for said crops is the town of Monticello, which is within one mile of said land ; that in order to reach said market it has ever been necessary that the appellees and their grantors should have a free and unobstructed passageway and road from said town to their land ; that the appellants own certain described land intervening between the land of the appellees and said town ; that for more than twenty years last past, and continuously and uninterruptedly ever since, the appellees and their grantors have held and enjoyed their land ; that they have used, claimed, and occupied, an easement and right to pass and travel, by a well-defined road, over the lands of the appellants, from said town to appellees' land for more than twenty years by wagons, and every and all usual methods of conveyance, unobstructed by gates, fences, or other hindrances, adversely to any claim of ownership by the appellants or their grantors, or any other person ; that said roadway and passage is clear and distinct, and for said period of more than twenty years has existed, as it now exists, thirty feet wide ; that in defiance of the appellees' rights and easement appellants are threatening to, and are about to, close

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up and obstruct said way and passage, and hinder and prevent appellees from passing to and from their land, as they have long been accustomed to do, by building a fence, or gate, across the roadway; that appellees have not procured, and can not procure, any other means of access or egress to and from their land; that on the 4th day of May, 1835, one John Rothrick owned all the real estate described in the complaint in fee simple, and on said day he conveyed to Robert Rothrick the real estate upon which the appellees reside, and that appellees derive their title thereto from conveyance from the said Robert Rothrick and his grantees; that said John Rothrick afterwards conveyed the real estate now owned by the appellants; that for more than twenty years last past the appellees and their grantors have enjoyed, as of right, and without interruption, said way from their land over the land of the appellants to a public street in the town of Monticello, at all times, for the more convenient occupation of their land, and without said way there was, and is, no way of reaching the land of the appellees, and that said road is the way over the land of the appellants that will least damage said land.

The appellants filed a motion to compel the appellees to paragraph the above complaint, upon the ground that it contained two separate and distinct causes of action, which motion was overruled by the court.

They also filed a motion to compel the appellees to make their complaint more specific in this, to wit: To set out the beginning, course and termini of the private way named in the complaint, but this motion was also overruled by the court.

The appellants then filed a joint answer consisting of four paragraphs, the first being a general denial.

The court sustained a demurrer to the second, third and fourth paragraphs of the answer and the appellants excepted.

A trial of the cause, by the court, without the intervention of a jury, resulted in the granting of a perpetual in-

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junction as prayed in the complaint, from which this appeal is prosecuted.

We do not think the court erred in overruling the motion of the appellants to compel the appellees to paragraph their complaint. This is not an action to establish a right of way over the lands of the appellant, but is an action to enjoin the appellants from obstructing a road already established. It is true the appellees seem to base their right to the way upon two grounds, namely, a right of necessity and a right by prescription, but the cause of action rests upon the threatened obstruction of the road described in the complaint. There is but one cause of action stated. Nor do we think the court erred in overruling the motion to compel the appellees to make their complaint more specific.

It is alleged that the way claimed by the appellees is a well defined road, thirty feet wide, which had been in use for more than twenty years, and was then open and in use.

As this was not an action to establish a way, but was an action to prevent the obstruction of one already established, we think the description was sufficiently specific.

It is also objected that the complaint does not state facts sufficient to constitute a cause of action, but we think it clearly appears from the complaint that the appellees have a right of way over the lands of the appellants by prescription. *Parish v. Kaspare*, 109 Ind. 586; *Hill v. Hagaman*, 84 Ind. 287.

The second paragraph of the answer averred that within the last twenty years one of the owners of the land, in which the appellees claim the easement, interrupted it by obstructing said way.

The third and fourth paragraphs of the answers state substantially the same facts, namely: that at the time of the purchase and occupancy of the land owned by the appellees there was a public highway passing through said lands, which connected with other highways and gave the appellees access to the town of Monticello and all other points;

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that the appellees obstructed said highway by fencing the same up and thereby cutting themselves off from said town and the markets therein.

Without inquiring whether the second paragraph of the answer was otherwise good, it is sufficient to say that the matter therein pleaded was admissible in evidence under the general denial, which was pleaded. When the general denial is pleaded no available error is committed by sustaining a demurrer to another answer which sets up such facts only as are admissible in evidence under the general denial.

The third and fourth paragraphs of answer are pleaded as a defence to all the matters set up in the complaint. As we have seen, this is not an action to establish a way, but to enjoin the obstruction of one already established. It is perfectly clear that these answers constituted no defence to the easement created by prescription, and for this reason the court did not err in sustaining a demurrer to them.

Finally, it is claimed by the appellants that the finding of the court is not sustained by the evidence in the cause.

It is contended that the uncontroverted evidence in the cause proves that the way in controversy is a public highway and not a private way.

Where land is so situated with reference to a public highway that such highway is necessary to ingress and egress to and from such land, the owner has a private easement in the public highway, and may maintain an action for its obstruction. *Ross v. Thompson*, 78 Ind. 90, and authorities there cited.

In order to maintain an action to enjoin the obstruction of such public highway, however, it should be described, in the complaint, as a public highway.

In this case the evidence tends to show that the way in dispute between the parties in this suit constituted a part of a public highway, known as the Monticello and Pittsburgh road. It crossed the Tippecanoe river near the land now

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owned by the appellees. Nearly twenty years before the commencement of this suit a dam was constructed across the river below the ford at which the road crossed, which backed the water to such a depth as to destroy the ford.

The evidence tends to show that after the destruction of the ford, that portion of the public highway embracing the way now in controversy was abandoned as a highway and has since been used by the appellees, and those through whom they make their title, as a means of ingress and egress to and from the appellee's land.

We can not say that the court could not have legally drawn the conclusion, from the evidence in this cause, that this way had ceased to be a public highway and was now a private easement appurtenant to the land of the appellees.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed Feb. 17, 1891.

127	250
128	335
127	250
130	349
130	481
127	250
131	523
133	223
133	442
127	250
139	610
127	250
145	608

No. 15,646.

THE FARMERS LOAN AND TRUST COMPANY v. THE CANADA AND ST. LOUIS RAILWAY COMPANY ET AL.

PLEADING.—*Sufficiency of.*—*Estoppel to Contest.*—*Arrest of Judgment.*—An agreement entered of record, and trial had thereunder by the court, that no answers to a complaint and cross-complaint need be filed, but all matters of defence, set-off, counter-claim and reply may be given in evidence without further pleading, followed by a decree thereon, cuts off a motion in arrest of judgment, and precludes any question being raised concerning the sufficiency of the pleading, except the question of jurisdiction of the subject-matter.

SAME.—*Issue, Waiver of.*—A voluntary submission of a cause for trial is a waiver of a failure to file pleadings forming an issue, even in the absence of an express agreement to that effect.

JUDGMENT.—*Interlocutory, What is Not.*—A submission of a case for trial

127	250
151	467
127	250
155	815
127	250
160	695
127	250
166	5

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to the court upon complaint and cross-complaint, with an agreement to allow all defences to be given in evidence, followed by a finding that the defendant's railroad ought to be sold, free of all encumbrance, to make assets to pay its indebtedness, and that the proceeds of the sale ought to be brought into court with leave to all parties to the action having liens, and all other lien-holders that may thereafter become parties to the action before final hearing, to establish their several claims, demands and liens, and their priority, as a lien upon the proceeds, and the rights of all such lien-holders ought to be transferred to the fund arising from the sale; followed by a reservation that the court reserves for its future adjudication the consideration and determination of the amount of the claims and liens and their priority as liens upon the proceeds of the sale, followed by a final decree, is not an interlocutory decree, but is conclusive upon the parties.

JUDGMENT.—*Sale of Railroad.*—A personal judgment against a railway company must be enforced against the entire railroad by a sale thereof, and not by a sale of an isolated part.

Sub-Contractors.—*Definition.*—*Mechanics' Liens.*—A sub-contractor is one who takes from the principal contractor a specific part of the work; but neither persons furnishing material, nor laborers on the work, are sub-contractors.

SAME.—*Payment.*—*Tender.*—*Mechanics' Liens*—A sub-contractor is bound to accept payment as provided in the principal contract; but if a proper tender is not made to him of the article in which he is to be paid, he may maintain an action for a money judgment. Material men and laborers, however, are not bound to accept anything in payment except money, whatever may be the contract between the owner and contractor.

MECHANIC'S LIEN—*Right to.*—*Compliance with Statute.*—*Results.*—The acquisition of a mechanic's lien results from a compliance with the requirements of the statute, and is not affected by the consequences which flow from its acquisition.

SAME.—*Enforcement.*—Over the question of enforcement the holder of a lien has no control. He has a right to have it enforced as the law directs, and not otherwise. He must pursue the terms of the statute.

RAILROAD.—*Mechanic's Lien.*—*Filing Notice.*—*Extent of Lien.*—In order to obtain a lien upon a railroad, a laborer or material man is only required to file notice in the recorder's office in the county where he furnished the material or did the work through which such road runs, and then such lien extends to the entire line of the road in this State. In case of a sale of the road and a transfer of the lien to the fund derived by the sale by the order of the court ordering the sale, the lien is transferred to the whole fund and not to a part.

SAME.—*Foreclosure and Sale of Railroad.*—A mechanic's lien on a railroad, although notice is filed only in one county, must be foreclosed against

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the whole line of road situate within the State, and the whole of that part of the road sold; a part of such part can not be sold.

SAME.—*Extends to the Entire Article Repaired.—Sale.*—A mechanic's lien for repairing an article extends to the entire article; and the whole of such article must be sold in order to enforce the lien.

SAME.—*Subsequent Mortgagee of Railroad.*—A lien acquired by filing notice in one county extends to the entire road within the State, and a subsequent mortgagee of the entire road takes his mortgage subject to such lien.

SAME.—*Mortgage.—Priority of Lien.—Bona Fide Holder.*—A mortgage of a railroad yet to be built to secure bonds issued to raise money for the construction of said railroad, is junior to a mechanic's lien acquired in furnishing material for or performing labor upon such railroad, unless it is affirmatively shown that the holders of such bonds paid value for them before notice of such liens.

SAME.—*Contractor can not Defeat Priority of Mechanics' Liens.*—A principal contractor can not defeat the liens of those whose debtor he is for work and materials, by asserting the lien of a mortgage executed by the owner by whom he was employed to build a house or a railroad. He can not defeat their liens by asserting a lien superior to them, no matter how he may acquire such superior lien.

SAME.—*Railroad.—Priority of Mortgage Executed to Secure Bonds Sold After Work Performed or Materials Furnished.*—A railway company entered into a contract with a contruction company to build and equip its road. The president of the railway company was the general manager of the construction company. Three months afterward the railway company executed in duplicate a trust deed of its road securing four hundred and forty bonds. One of these duplicates was delivered by its president, more than two months after its execution, to a loan company, and the other retained by the railway company. The railway company also retained the bonds secured when it delivered the trust deed, but, from time to time, delivered them to the general manager of the construction company upon estimates issued to him by the engineers of the railway company. Ten of these bonds were transferred to D. and sixty-six to F., a sub-contractor. The remainder of the bonds, three hundred and sixty-four, were hypothecated by the construction company, but when, where, to, or for how much, was not shown. Material men and mechanics, working for the construction company, filed notices, after the date and delivery of the trust deed, of an intention to claim liens for materials furnished and labor performed in the construction of such railroad.

Held, that the liens of such material men and laborers were superior to all the holders of said bonds secured by such trust deed.

FRAUD.—*Special Finding.*—Fraud must be found and stated in a special finding as an inferential or ultimate fact, and it is not enough to state the badges, or evidences, of fraud.

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LIENS.—Priority Between Special Liens.—*Holder of General Liens can not Question.*—Where a fund in court is insufficient to satisfy all specific liens, a creditor having only a general equitable lien can not complain because one of the specific lien-holders is decreed a greater part of the fund than he is entitled to as against the other specific lien-holders.

SAME.—Payable out of Specific Part of Fund.—*Failure to so Decree not Error.*—A mechanic holding a lien awarded his full claim out of a fund in court can not complain because it was not made payable out of the allowance made to another claimant of a part of the fund.

SAME.—Creditors Holding General Equitable Liens can not Defeat Specific Liens on Corporate Property.—Creditors obtaining a general equitable lien against an insolvent corporation upon funds brought into court for distribution, have a lien only against the corporation and its shareholders, and not against lien-holders who have specific prior liens upon the corporate property created before the court received the fund.

From the Elkhart Circuit Court.

W. L. Stonex, H. A. Gardner, — Gardner, — McFadon and — Gardner, for appellant.

J. H. Baker, F. E. Baker, W. H. Vesey, C. W. Miller, E. E. Mummert, H. D. Wilson, W. J. Davis, J. D. Osborne and A. S. Zook, for appellees.

ELLIOTT, J.—The appellant asserts a prior lien upon a fund derived from the sale of a railroad owned by the Canada and St. Louis Railway Company, and the appellees, other than the railway company, contest the claim of the appellant, asserting that they hold prior liens under the lien laws of this State.

By motion in arrest of judgment the appellant attempts to challenge the counter-claims or cross-complaints filed by the mechanics, material men and laborers. Whether this attempt can prevail depends upon the effect of a decree made during the progress of the case. The recitals of the record material to the immediate points in dispute are these: "And now comes the plaintiff and come also the defendants and cross-complainants, and, by agreement of parties, it is ordered that said complaint and each of said cross-complaints shall be heard and determined by the court without pleadings or

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answers, the same as though each complaint and cross-complaint had been formally answered unto by said respective defendants therein, and it is agreed that all matters of defence, set-off, counter-claim and reply, may be given in evidence, by any party against any other party, without further pleadings. And thereupon said complaint and cross-complaints being at issue, under the agreement aforesaid, the same are severally submitted to the court for trial by agreement of all the parties, and the court, having heard the evidence and being sufficiently advised in the premises, finds that the Canada and St. Louis Railway Company is indebted to said plaintiff in the sum of two hundred thousand dollars and more; that said plaintiff and said several cross-complainants have and hold liens on said railway and its property and franchises for money due and owing for the right of way, for work and labor, for materials furnished and by virtue of a mortgage executed by it to the Farmers Loan and Trust Company of New York." We have no doubt that the agreement of the parties and the decretal order cut off a motion in arrest of judgment. Where parties agree that pleadings are sufficient they can not afterwards make any question upon them except the question of jurisdiction of the subject. There is here an express agreement that the "complaint and cross-complaints shall be heard and determined by the court," and in the face of this agreement the appellant can not, after a final hearing, challenge the sufficiency of the cross-complaints. Not only is there an express agreement to the effect stated, but there is also an agreement dispensing with further pleadings and submitting the cause to the court for trial, thus clearly waiving all objections to the pleadings. This agreement was carried into effect by a trial pursuant to the agreement of the parties and a judgment deciding the questions submitted to the court. Even in the absence of an express agreement the voluntary submission of a cause for trial waives the failure to file pleadings forming an issue. *June v. Payne*, 107 Ind. 307; *City of Warsaw*

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v. Dunlap, 112 Ind. 576; *Hartlep v. Cole*, 101 Ind. 458; *Johnson v. Briscoe*, 92 Ind. 367; *Hege v. Newsom*, 96 Ind. 426; *Chambers v. Butcher*, 82 Ind. 508; *Lewis v. Bortfield*, 75 Ind. 390; *Felger v. Etzell*, 75 Ind. 417. The principle asserted in the cases cited fully authorizes our conclusion that the appellant is precluded from attacking the pleadings; that principle would, indeed, warrant us in going much further than it is necessary or proper for us to do in this instance.

The decree from which we have copied is conclusive upon the parties in so far as it adjudges that they are each and all holders of liens against the railroad. This appears in the extract we have already copied from the decree, and it is made still clearer by the recital which reads thus: "And the court further finds that the Canada and St. Louis Railway with all of its rights of way, road-bed, depots, depot grounds, and all of its rights, franchises and property, ought to be sold to make assets to pay its indebtedness and liabilities, and that the proceeds of said sale ought to be brought into court, with leave to all parties herein, and all other lienholders who may come in and become parties to the proceedings before the final hearing thereof, to establish their several claims, demands and liens, and the respective lien of each and the priority of the same, as a lien upon the proceeds of said sale. And the court further finds that said railroad property ought to be sold free and discharged of all liens and encumbrances, and the rights of all such lienholders and creditors ought to be transferred to the fund arising from such sale." These provisions, of themselves, make it plain that the court found that all the parties in court at the time the decree was entered were the holders of liens, but if these provisions left any doubt upon the question, it would be removed by a provision in a subsequent part of the decree which reads as follows: "And the court hereby reserves for its future consideration the consideration and determination of the amount of said claims and liens, and the

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respective lien of each, and the priority of the same, as a lien upon the proceeds of the sale." One question is settled by this decree, namely, that all the parties have liens; two questions are left undetermined, namely, the amount of their respective liens and their priority. This decree was not objected to in any mode, but, on the contrary, was acquiesced in by the parties, and, as it was made upon a trial pursuant to the express agreement of the parties, it is conclusive upon them as to the questions tried and determined.

It is said that the decree is interlocutory, and, therefore, not conclusive. We are not inclined to regard it as a mere interlocutory decree, inasmuch as it was made after the submission of the cause for trial and after hearing the evidence, and is, in its nature, final rather than interlocutory. It may not, perhaps, be true that it is final in such a sense that an appeal would lie from it, but it has in many respects the qualities and effect of a final decree. But conceding, for the sake of the argument, that it is a mere interlocutory decree, still it must be held that as to this case and upon the questions submitted for trial, and after trial fully adjudicated, it is final and conclusive. *Ray v. Law*, 3 Cranch, 179; *Morey v. King*, 49 Vt. 304. In the case of *Fleenor v. Driskill*, 97 Ind. 27, this doctrine is carried much beyond the limits to which we carry it in this instance. We add, to prevent misconception, that we neither hold, nor mean to hold, that the decree in this instance was beyond change by the court while the proceedings were *in fieri*, nor do we hold that it would have constituted a conclusive adjudication had no final decree been rendered; all that we can with propriety decide is, that as to this particular case it is conclusive because rendered after trial and followed, without change, by a final decree.

The questions which remain for decision are those not adjudicated by the decree which we have considered and to which we have given a construction. The first of these questions arises upon the contention of the appellant that the ap-

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pellees are sub-contractors, and as such are bound to take payment in bonds, for the reason that the principal contractors agreed to accept bonds in payment. It is probably true that one who in strictness occupies the position of a sub-contractor is bound to accept payment as provided in the principal contract. *Stewart v. Wright*, 52 Iowa, 385; *Jones Lumber Co. v. Murphy*, 64 Iowa, 165; *Stout v. Golden*, 9 W. Va. 231; *McKnight v. Washington*, 8 W. Va. 666; *Bowen v. Aubrey*, 22 Cal. 566; *Henley v. Wadsworth*, 38 Cal. 356; *Reeve v. Elmendorf*, 38 N. J. L. 125; *Campbell v. Scaife*, 1 Phila. 187. But the conclusion asserted by appellant requires another premise to make it valid, and that premise is, that laborers and material men are sub-contractors. This premise is assumed by appellant's counsel without proof, and we regard the assumption as an illicit one, for we do not believe that a laborer, working by the day, or a material man, who delivers ties or lumber, is a sub-contractor within the meaning of our lien law. We suppose a sub-contractor to be one who takes from the principal contractor a specific part of the work, as, for instance, one who agrees with the principal contractor to construct ten miles of a railroad out of a line of twenty or more miles which the principal contractor had undertaken to build. Certainly, no other conclusion will harmonize with the doctrine long maintained by this court. *Barker v. Buell*, 35 Ind. 297; *Colter v. Frese*, 45 Ind. 96. Other courts have more clearly than our own marked and enforced the distinction between sub-contractors and laborers, as well as between sub-contractors and material men. *Duncan v. Bateman*, 23 Ark. 327; *Huck v. Gaylord*, 50 Texas, 578; *Pitts v. Bomar*, 33 Ga. 96.

If, however, we are wrong in holding that laborers and material men are not sub-contractors within the meaning of our statute, still the appellant can not succeed upon the point under immediate discussion. To entitle it to succeed, even

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upon its own theory of the law, it must show a proper tender of bonds, otherwise the claims of the lienors are payable in money, for money is the ordinary medium of payment, and is always demandable where there is no agreement providing for payment in property, as well as where there is such an agreement, but no tender by the debtor. *Nipp v. Diskey*, 81 Ind. 214; *Ireland v. Montgomery*, 34 Ind. 174; *Parks v. Marshall*, 10 Ind. 20; *Mason v. Toner*, 6 Ind. 328; *Duereson v. Bellows*, 1 Blackf. 217; *Hancock v. Yaden*, 121 Ind. 366, and cases cited; *Vansickle v. Furgeson*, 122 Ind. 450. It is unnecessary to decide whether in such a case as this a strict legal tender is required, or whether an equitable tender would be sufficient, for there was neither an offer to pay in bonds nor a tender of any kind.

The next question open to discussion, and requiring decision, is as to the extent of the lien of the laborers and material men. In order to properly consider this question it is necessary to state the facts from which it emerges. The laborer's and material men did work upon and furnished material for a part of the railroad, and filed notices of liens. The railroad extends through several counties, and is a continuous line from a point in this State to a point in the State of Michigan. The contention of the appellant is that the railroad is an entirety, and that as notices of liens were not filed in all the counties no such lien was acquired as entitles the appellees to share in the fund derived from the sale of the entire road. We fully agree with appellant's counsel that a continuous line of railroad is to be treated as an entirety, and we adjudge that as such it must be sold, for it would be unjust to lienholders, as well as to the railroad company, to sell a bridge, a culvert, or a few rods, or even mile, of the railroad. *Midland Railway Co. v. Wilcox*, 122 Ind. 84; *Louisville, etc., R. W. Co. v. Boney*, 117 Ind. 501; *Muller v. Dows*, 94 U. S. 444. But it by no means follows that because the entire road must be sold it is necessary that a lien should be acquired on every part of it. The right to en-

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force the lien necessarily requires a sale of the whole road, since it can not be sold in fragments ; but neither the right to the lien, nor the mode of acquiring it, is affected by this consideration. The acquisition of a lien results from a compliance with the requirements of the statute, and is not affected by the consequences which flow from its acquisition. If the claimant does what the statute requires he obtains a lien, and in order to enforce the lien the law declares what shall be done ; but over the question of enforcement the lienor has no control. If he obtains a lien in the authorized mode he has a right to have it enforced as the law directs, and not otherwise. The claimant must undoubtedly do what the statute commands ; but when he does this his right is complete, and subsequent considerations affect the mode of procedure, not the substantive right to a lien. *Dana v. Railroad Co.*, 27 Ark. 564 ; *Cox v. Western Pacific R. R. Co.*, 44 Cal. 18 ; *Cox v. Western Pacific R. R. Co.*, 47 Cal. 87 : *Knapp v. St. Louis, etc., R. W. Co.*, 74 Mo. 374, and *Cranston v. Union Trust Co.*, 75 Mo. 29, are relevant to one branch of our discussion, for they affirm that a railroad must be treated as an entirety ; but they are not relevant to the question whether a lien filed in one county entitles the lienor to invoke judicial aid for the enforcement of his right. They do not determine whether or not a lien may be acquired that will entitle the holder to enforce it, although it is acquired by filing notice in only one county. That we regard as the only question here, for the demand of the lien-holders is to share in the fund derived from the sale of the entire road. There seems to have been no authoritative decision of the question in *Boston v. Chesapeake, etc., R. R. Co.*, 76 Va. 180, although the reasoning of the court indicates that it was inclined to the opinion that notice must be filed in every county traversed by the road. We can not assent to this reasoning, as it would break down the policy of our laws protecting laborers to require them to file notices in every county, for laborers whose claims were small

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could not afford to file notices all along the line of the railway. The consequence to which the reasoning would lead goes very far to prove it unsound. If it be true that notices must be filed along the entire line, then it must also be true that the laborer must follow the railway throughout all the States it traverses, even if it extended from seaboard to seaboard across the whole country ; and, surely, it can not be legally possible that he must pursue such a course. It seems clear to us that if a lien is acquired in any county as the law directs, then it is enforceable as the law provides. If there is a lien upon any part of the railroad it is enforceable against all the road, because all the road must be sold ; but there is none the less a lien on this account. The acquisition of the lien is one thing, the mode of its enforcement another, and it does not follow that to acquire a lien the mode of enforcement must control the proceedings of the lienor, for with the question of enforcement he has no immediate concern until there is need of judicial assistance. The acquisition of the lien comes first, the question of its enforcement is an independent and subsequent consideration. The principle we enforce is not a novel one ; it is almost as old as the common law itself, for it is involved wherever there is a lien for repairs upon personal property of an indivisible nature. In all such cases the entire thing must be sold although the mechanic has improved or repaired only an insignificant part of it.

If we are right in what we have said, it must follow that if any valid lien at all was acquired it entitles the lien-holder to share in the fund brought into court for distribution. Whether any lien was acquired upon any part of the railroad depends upon the statute authorizing the acquisition of liens upon railroads. If that statute requires that notices be filed in every county there is no lien upon the road. If the statute requires a notice in only one county there is a lien extending to the entire fund for the reason that the railroad is an entirety and as such must be sold. This is the doctrine asserted in the case of *Louisville, etc., R. W. Co. v.*

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Boney, 117 Ind. 501, for in that case the notice was filed in one county and yet it was held that the lien must be enforced against the road as an entirety. The authorities referred to in that case prove that where a judgment establishing what may be called a personal liability, is obtained, it is to be enforced against the entire railroad and not by the sale of an isolated part. *Black v. Delaware, etc., Canal Co.*, 22 N. J. Eq. 130; *Thomas v. Railroad Co.*, 101 U. S. 71; *Muller v. Dows, supra*; *East Alabama R. W. Co. v. Doe*, 114 U. S. 340; *Stewart's Appeal*, 56 Pa. St. 413; *Richardson v. Sibley*, 11 Allen, 65; *Foster v Fowler*, 60 Pa. St. 27. The same doctrine is declared and enforced in the case of *Midland R. W. Co. v. Wilcox, supra*. There is nothing in the opinion in the case last cited which authorizes the conclusion that a notice of an intention to hold a lien must be filed in every county traversed by the railroad; on the contrary, a different rule was impliedly suggested if not expressly declared. It was there said: "Where, as here, a line of railroad, although it extends through two or more counties, is treated in the contract, and in the performance of the work under the contract, as a continuous line of road, the contractors are not required, as against the railroad company, however it may be as to mortgagees or judgment creditors, to divide the road into parts corresponding to the counties it traverses, and enforce the lien in each county separately." It was not necessary to decide in that case what the rule is where mortgagees are interested, nor was it necessary to decide whether notice of a lien must be filed in every county where work was done only in one, and there was no decision upon those questions. It is not necessary to decide in this case whether in cases where work is done in more than one county notices must be filed in all the counties, for, as we understand the finding of the trial court, it was favorable to the appellant upon this question. We do decide, however, that where a lien is obtained upon a railroad by filing such a notice as the law requires in one

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county, the lien thus created extends to the fund derived from a sale of the entire railroad pursuant to an interlocutory decree rendered after trial, and in cases where the parties by agreement submit the questions to the court for trial at the intermediate hearing.

We here adjudge that the general principle asserted in *Midland R. W. Co. v. Wilcox*, *supra*, applies to mortgagees as well as to owners, and that a valid lien once acquired reaches the entire railroad as a unit. In the case of *Brooks v. Railway Co.*, 101 U. S. 443, it was held that where a mechanic files his notice within the time and in the mode prescribed by the statute, he has, as against the mortgagee, a paramount lien upon the entire road. In disposing of the argument that the lien did not extend to the entire road, the court said: "The argument seems to us extremely technical, and at war with the principle in which liens are allowed for work done subsequently to the creation of a mortgage. That doctrine, or rather the statute which the court construed as giving a permanent lien under such circumstances, was in existence when the mortgage of the appellants was made. It entered into and became part of their contract. They knew that the road was yet to be built, and that while such building would add to the value of their security, the law gave to the men whose labor and money built it a lien superior to that of the mortgage. Now that the venture in which both embarked is to end in loss to one or the other of them, there is no judicial propriety in straining the law to limit the rights of one party rather than those of the other. If that law by its fair construction gives the mechanic a lien for a few thousand dollars on the whole road, instead of a part of it, the law should prevail." This reasoning clearly demonstrates the validity of the conclusion that a lien once effectually acquired fastens upon the entire road as a unit, and is not confined to mere detached parts of it. Any other rule would, as we have suggested, in many cases render the lien statute entirely nugatory, since it would preclude the enforcement of the lien, and in many

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other instances it would work great injustice to the stock-holders of a railroad corporation. But there is another consideration not to be overlooked, and it is one which it must be presumed entered into the minds of the law-makers; that consideration is this: The public have a right to have a railroad remain an entirety, and it would be destructive to public interest to permit it to be broken up into disjointed and practically useless fragments. *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581, and authorities cited; *Midland R. W. Co. v. Wilcox*, *supra*, vide p. 95. Sound policy and due regard for public welfare, as well as for the rights of individuals, require that a railroad shall be treated as an entirety, both as to the mode of acquiring a lien and as to the mode of its enforcement.

The remaining question may be thus stated: Is the lien of the appellant's mortgage superior to the liens of the appellees? In order to intelligently discuss this question it is necessary to state the material facts out of which it arises. Those facts may be thus summarized: On the 28th day of May, 1888, the railway company entered into a contract with the Burns Construction Company to build and equip its road. Burns was the president of the railway company and also the general manager of the construction company. On the 28th of August, 1888, the railway company ordered the execution of a trust deed, and the instrument was written and signed in duplicate; one of the duplicates was delivered by Burns to the Farmers Loan and Trust Company on the 8th day of October, 1888, the other was retained by the railway company. The bonds which the trust deed was executed to secure were retained by the company that executed the mortgage, but from time to time bonds were delivered to Burns upon estimates issued to him by the railway company's engineer. Ten of the bonds were transferred to William Dallin, and sixty-six were transferred to John Fitzgerald, a subcontractor. The remainder of the bonds, three hundred and sixty-four in number, were hypothecated by the Burns Con-

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struction Company, but when, where, to whom, or for how much, is not shown.

In considering the question of priority one of the important things to be kept in mind is that the mortgage was executed upon property that had, in fact, no existence, for the railroad had not been built. That there is a material difference between a case, such as this, where the railroad has not been built and a case where the railroad has been constructed, is so evident that no one can fail to perceive it the instant his attention is directed to the matter. As held in *Brooks v. Railway Co.*, *supra*, parties must, in such a case as this, be deemed to have contracted with reference to the existing condition of things, so far as they were open to observation. The mortgagee must have known that his security was valueless as long as there was no road in existence, and it must have known, also, that labor, materials and money would be required to build the road. It was bound to know, too, what the law was, for, as said in *Brooks v. Railway Co.*, *supra*, "It entered into and became a part of their contract." This general rule has been repeatedly declared and enforced by this court. *Carr v. State, ex rel., ante*, p. 206; *Hancock v. Yaden, supra*, see p. 370; *Long v. Straus*, 107 Ind. 94; *Bryson v. McCreary*, 102 Ind. 1; *Edwards v. Johnson*, 105 Ind. 594; *Bass v. Doerman*, 112 Ind. 390. In *Warren v. Sohn*, 112 Ind. 213, the principle we are discussing was applied to the case of a lien asserted by a miner, and it was held that the lien was superior to a mortgage. But the present case is much stronger than the one referred to, for here there was, in fact, no property in existence when the mortgage was made; the property upon which the mortgage finally fastened was created by the labor, materials and money of the appellees. We are strongly inclined to doubt whether the mortgage lien would be paramount even if the bonds which the mortgage was executed to secure had been delivered before any notices of liens were filed. Very strongly reasoned decisions declare that the

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liens of the mechanics are superior to the liens of the mortgage in cases where the mortgage is executed before the construction of the railroad. *Neilson v. Iowa, etc., R. W. Co.*, 44 Iowa, 71; *Equitable Life Ins. Co. v. Slye*, 45 Iowa, 615. We need not, however, decide this question, but it is proper to say that as the labor, materials and money of the appellees gave all there is of value to the property claimed under the mortgage, the mortgagee ought to show a clear, strong, superior right in order to defeat the claims of those who in reality brought the property into existence. The doubt in our minds is whether the mortgagee's lien can in any event be justly held to be the prior one. We have no doubt that if the mortgagee can succeed at all it must be because it is shown clearly and strongly that the mortgagee is a *bona fide* purchaser. In our judgment the appellant has shown no such right as entitles it to the paramount lien.

It is true that the trust deed or mortgage was placed in the hands of the mortgagee or trustee before some of the notices were filed, but the instrument securing the bonds was a mere shadow, for had no bonds ever been delivered to *bona fide* holders, the instrument would never have been effective against these lien-holders. We are far within the authorities in asserting this, as they carry the doctrine much farther. *Hough v. Osborne*, 7 Ind. 140; *Garrett v. Puckett*, 15 Ind. 485; *Hubbard v. Harrison*, 38 Ind. 323; *Felton v. Smith*, 84 Ind. 485, see p. 495; *Reeves v. Hayes*, 95 Ind 521; *Day v. Bowman*, 109 Ind. 383; *Midland R. W. Co. v. Wilcox*, *supra*. The delivery of the mortgage or trust deed alone did not destroy the priority of the liens of the appellees, for the delivery of such an instrument can not, of itself, defeat equitable or legal claims, since it is essential that one who asserts a right against a legal or equitable claim should show that he parted with value before notice of such equitable or legal right. *Anderson v. Hubble*, 93 Ind. 570, and cases cited; *Hunsinger v. Hofer*, 110 Ind. 390. This is the rule in ordinary cases, and, certainly, it must govern a

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case like this, where the mortgagee seeks to defeat the claims of those whose labor, materials and money created the property which it is sought to subject to the lien of the mortgage. The mortgagee must succeed, if at all, as a *bona fide* holder of bonds executed under the mortgage; it can not, as against the claims of laborers, mechanics and material men, be deemed a *bona fide* holder unless it affirmatively shows that it paid value for the bonds before notice of the liens. The rule in analogous cases is well settled in this State, and the strong equities of the appellees call for its liberal application in this instance. *Giberson v. Jolley*, 120 Ind. 301; *First Nat'l Bank v. Ruhl*, 122 Ind. 279. There is reason for saying that it was the duty of the party buying the bonds to ascertain whether a lien had been placed on the property prior to the time of his acquisition of those instruments, but we do not go so far as that in this case. *Woodbury v. Fisher*, 20 Ind. 387. We are not here seeking a general rule that shall apply to every case resembling the present, nor do we attempt to lay down any such rule; we simply adjudge that in such a case as this the mortgagee can not prevail over laborers and material men without showing that it is a *bona fide* holder of the principal debt in all that the term *bona fide* holder implies. It can not in a case like this, where there was no railroad in existence when the mortgage was delivered, be deemed a *bona fide* holder as against laborers, mechanics and material men without showing that, before notice of the acquisition of the liens under the statute, a fair value was paid for the bonds. The purchase of negotiable instruments at a price much less than their value may be, in some instances, evidence tending to show that the holder had knowledge that the instruments were not obtained or transferred fairly or honestly. *Schmueckle v. Waters*, 125 Ind. 265. To such a case as this that rule applies, for justice demands that the claimant of a superior lien should, at least, affirmatively

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show that a fair price was paid for the bonds before notices were filed under the lien law.

If the Burns Construction Company, the principal contractor, had become and remained the owner of the bonds in absolute good faith, it could not have defeated those from whom it purchased materials nor those whom it employed to do work upon the railroad. It is very clear that a principal contractor can not defeat the liens of those whose debtor he is for work and materials, by asserting the lien of a mortgage executed by the owner by whom he was employed to build a house, a mill or a railroad. To deny this would be to affirm that the principal contractor may leave his workmen unpaid, and, for his own benefit, exhaust the property which supplies the chief security of all. The plainest principles of equity require that the contractor shall not be allowed to defeat the liens of laborers, mechanics or material men by asserting a lien superior to theirs, no matter how that lien may be acquired. The delivery of the bonds to the Burns Construction Company did not, therefore, vest title so as to cut out the appellees, and unless the appellant acquired the bonds as a *bona fide* holder, after the delivery to the Burns Company, it can not prevail against the appellees. If it is the mere assignee of the Burns Company, it can not defeat the lien-holders, for, as a mere assignee, it can hold by no better title than its assignor, hence it is evident that the only capacity in which it can by any possibility succeed is that of a *bona fide* holder of instruments negotiable under the law merchant.

The cases of *Choteau v. Thompson*, 2 Ohio St. 114, *Crowell v. Gilmore*, 18 Cal. 370, and *Preston v. Sonora Lodge*, 39 Cal. 116, are not relevant to the point in dispute. In those cases there was no question as to the creation or purchase in good faith of the debt evidenced by the mortgage under which the superior lien was asserted, so that granting (but by no means deciding) that the doctrine asserted by those cases is sound, still it does not control this case, for here the

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question is whether the appellant, having acquired title through a party who, as against his own employees and sub-contractors, could not be a *bona fide* holder of the negotiable instruments, can defeat the prior equities of such persons without showing that it paid value for those instruments before the equities, in the form of statutory liens, fastened upon the mortgaged property. If the Burns Construction Company had occupied the position of a *bona fide* holder of the bonds in the full sense of the term, the appellant would be in a much better position; but, as we have suggested, until it climbs to a higher place than that of a mere assignee of the Burns Construction Company, it has no legal or equitable rights greater than those which resided in its assignor. The Burns Company could not have defeated its own employees and sub-contractors, and its assignee stands in its place.

We do not doubt that in cases where all is fair and there is no wrong practiced, the presumption is, as against the maker of a negotiable instrument, that the holder paid value for the instrument of which he shows himself to be the owner. *Collins v. Gilbert*, 94 U. S. 753; *McCurdy's Appeal*, 65 Pa. St. 290; *Duncan v. Gilbert*, 29 N. J. L. 521; *Valette v. Mason*, 1 Ind. 288. But, even as against the maker of such an instrument, where there is fraud the rule is different. *Giberson v. Jolley*, *supra*; *Harbison v. Bank*, 28 Ind. 133. It is, however, unnecessary to enter upon a consideration of that general subject, for the question here is, not as to the right of a maker of a negotiable instrument to defend, but the question with which we are here concerned is, what equities shall prevail and in what order shall a fund in the hands of the court be distributed to different classes of claimants? It is evident, therefore, that the presumption which obtains in ordinary cases can not prevail where those whose labor and materials brought the mortgaged property into existence are asserting liens against a mortgagee claiming under the principal contractor by whom the mechanics

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and laborers were employed. In order to defeat the strong equities of the lien-holders, there must, upon every principle of justice, be evidence that fair value was paid for the bonds, for when it is made to appear that the railroad existed only in the minds of its projectors at the time the mortgage and bonds were placed in the hands of the original contractor, there is no foundation for the presumption which prevails where no element of fraud or unfairness taints or poisons the transaction. Whatever may be said of such cases as *Dunham v. Cincinnati, etc., R. W. Co.*, 1 Wall. 254, and *Galveston Railroad v. Cowdrey*, 11 Wall. 459, in view of the later cases in the same court to which we have referred, it is, at all events, safe to affirm that they are not of controlling influence in a case such as this, where it affirmatively appears that the bonds were pledged by a principal contractor who could not, without a violation of good faith, enforce the bonds to the injury of the laborers and mechanics employed to build the railroad. It may also be said of those cases that there was affirmative evidence that full value was paid for the bonds, and no question arose on that point. Our ultimate conclusion is that the appellees were justly adjudged to have the prior lien upon the fund derived from the sale of the railroad. No other conclusion will, as we believe, give just effect to our statute awarding liens to laborers, mechanics and material men.

Cross-errors alleged by some of the appellees present questions which require consideration. The first of these questions arises on the claim put forward by counsel that the transaction between the Burns Construction Company and the railway company was a fraud upon the rights of the creditors. While there are circumstances indicative of fraud, there is no finding that there was fraud in fact, and hence the complaining appellees are not entitled to judgment, upon the ground that the transaction was a fraud upon their rights. It is settled by our decisions that fraud must be found and stated as an inferential or ultimate fact, and that it is not

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sufficient to state badges of fraud, or the evidences of fraud, in a special finding. *Cicero Tp. v. Picken*, 122 Ind. 260; *Kirkpatrick v. Reeves*, 121 Ind. 280; *Wilson v. Campbell*, 119 Ind. 286; *Phelps v. Smith*, 116 Ind. 387; *Bartholomew v. Pierson*, 112 Ind. 430; *Stix v. Sadler*, 109 Ind. 254; *Elston v. Castor*, 101 Ind. 426.

The second of the questions presented by the assignment of cross-errors arises on the order made allowing the claim of the sub-contractor, John Fitzgerald, and giving it an equal place with other claims secured by liens to the exclusion of unsecured claims. In our judgment the trial court did not err to the prejudice of the complaining unsecured creditors; for, if Fitzgerald's claim should be cut down as they insist, still, as he was, at all events, a lien-holder, they can not have priority over him to the exclusion of the appellant. If his claim were cut down the appellant would undoubtedly be entitled to the benefit; for after the payment of the prior lien-holders it has the superior claim. If the amount realized from the sale of the railroad had been sufficient to pay the appellant, and all other lien-holders, there would be plausibility in counsels' position; but as the amount derived from the sale was not sufficient to discharge all the liens their position is untenable. It seems quite clear that where a fund, brought into court for distribution, is insufficient to satisfy all specific liens, a creditor having only a general equitable lien can not complain because one of the specific lien-holders is decreed a greater part of the fund than he is entitled to as against other specific lien-holders.

The question presented by the contention of Charles Trainor must be decided against him. His contention is that, although he was allowed his claim yet there was error because it was allowed out of the general fund, and not out of the part allotted to the sub-contractor, Fitzgerald. This contention can not prevail, for the reason that where a mechanic is awarded all he is entitled to out of a fund in court he can

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not be heard to complain because it was not made payable out of the allowance made to another claimant of the fund. If his claim is satisfied he is in no plight to ask anything more.

It is true that creditors may obtain a general equitable lien as against an insolvent corporation upon funds brought into a court of chancery for distribution. *Upton v. Tribilcock*, 91 U. S. 45; *Sanger v. Upton*, 91 U. S. 56; *Wood v. Dummer*, 3 Mason, 308; *Rouse v. Merchants' Nat'l Bank*, 46 Ohio St. 463. But this equitable lien prevails against the corporation and its shareholders and not against lien-holders who have specific prior liens upon the corporate property created before the court received the fund. The difficulty which counsel can not here surmount grows out of the fact that specific liens existed against the property converted into the fund, for where such specific liens exist they outrank mere general equitable liens, and the order of priority is time. *Paxton v. Sterne, post*, p. 289. It is evident from what has been said that the rule which governs where the contest is waged between shareholders and creditors can not apply where the controversy is between the holders of specific liens acquired before the conversion of the property into an equitable fund and creditors who have a mere general equitable lien upon the fund. This principle is decisively against the appellees who assign cross-errors.

Judgment affirmed.

Filed Feb. 17, 1891.

Bowers *v.* The State, *ex rel.* Taylor.

No. 14,776.

BOWERS *v.* THE STATE, EX REL. TAYLOR.

SCHOOLS.—Suspension of Pupil.—Mandamus.—Contempt of.—In an action to compel a city school superintendent by mandamus to re-admit to school the relator's son alleged to have been wrongfully suspended, the answer alleged that the boy had been suspended for a violation of a rule, which was set out. A demurrer to the answer was overruled, and a reply of general denial was then filed. The trial resulted in a finding for the relator and a peremptory writ issued. Immediately thereafter the boy was re-admitted to school, but for a violation of the same rule for which he had been first suspended he was again suspended.

Held, that the court by overruling the demurrer to the answer adjudged that the rule was reasonable, and hence the defendant was not in contempt in suspending the pupil a second time.

From the Jay Circuit Court.

J. W. Headington, J. F. La Follette and H. N. Headington,
for appellant.

D. T. Taylor and R. H. Hartford, for appellee.

MCBRIDE, J.—Appellant was superintendent of the public schools of the city of Portland, Jay county. At the September, 1888, term of the Jay Circuit Court the relator filed a complaint in said court, alleging the wrongful suspension from said school by appellant of the relator's son, aged eleven years, and asking a writ of mandamus to compel appellant to re-admit him.

An alternative writ was issued and served, and on the return day the appellant appeared, and, after some preliminary steps, filed an answer in general denial, and also a special answer, alleging, in substance, that the boy had been suspended because of the violation by him of a certain rule theretofore adopted by the board of school trustees of said city as one of a code of rules for the government of the schools of the city, and of the superintendent, teachers and pupils of such schools. The rule in question was as follows:

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“ Rule 2. Any pupil who shall be absent two half days in any school month, or who shall be frequently tardy without satisfactory excuse to the teacher from parent or guardian, given in person or by written note, shall be reported to the superintendent, who shall, without exception or favor, suspend the pupil from school. Pupils thus suspended shall not be restored to the school until the parent or guardian shall give satisfactory assurance that the attendance shall be punctual in the future, and permission obtained from the school board or superintendent.”

A demurrer to the special answer was overruled, a reply of general denial was filed, and the cause was tried by the court. The trial resulted in a finding for the relator and a judgment awarding a peremptory writ of mandate commanding the appellant to admit the relator’s said son to the school.

This was on the 12th day of October, 1888, and the writ issued on the 19th day of October, 1888, but was not served until the 21st day of November, 1888. On the 11th day of December, 1888, the relator filed in said court his affidavit charging that appellant, in violation of said order, still excluded his said son from said school, and asking that he be attached and punished for contempt of court for disobeying said order. Appellant was ruled to appear and show cause why he should not be adjudged in contempt of court and punished accordingly.

In obedience to this rule the appellant filed his answer, under oath, showing that immediately on the making of the order for the re-admission of the boy to the school, in October, he had been re-admitted thereto, and had thereafter continued to attend the school until the 15th day of November, when, for violation of the rules of the school he was again, by order of the board of school trustees of the city, suspended. That the violation of the rules for which he was the second time suspended occurred long after the order was

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made for his re-admission, and after he had been restored to said school in obedience to said order.

The court held the answer insufficient, and the appellant declining to answer further the court made the following finding and order:

“The court finds that said pupil was suspended under Rule 2, since the rendition of judgment in the principal cause, and that the court deems said Rule 2, which is in words and figures as follows, to wit, (see rule hereinbefore set out), an unreasonable and pernicious rule, tending to promote suspensions and expulsions, and to deprive pupils of the benefit of the public schools, without any misconduct on their part for which teachers or school officers have any right to suspend or expel. Wherefore the defendant is ordered to receive back into the public schools said infant, Eugene B. Taylor. And it is therefore considered and adjudged by the court that the defendant, Henry W. Bowers, is guilty of contempt, and that he do make his fine unto the State of Indiana in the sum of five dollars and pay all costs in the cause. And it is further adjudged by the court that the defendant stand committed until said fine and costs are paid or remitted.”

We are unable to see upon what ground the appellant could be adjudged guilty of contempt of court. His action, or rather the action of the school board through him, in the second time suspending the pupil, was not in violation of the order for his restoration, but was in exact accordance with the judgment of the court as shown by the record. When the appellant filed his answer to the alternative writ of mandate he showed thereby that the pupil had been suspended for violating Rule 2, and for no other cause. Two issues were formed on this answer, one of law and one of fact. The relator having demurred to it he thereby tendered an issue of law as to the sufficiency of the answer. The court by overruling the demurrer adjudged the answer sufficient. This was an adjudication that the rule in question

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was reasonable, and that in its adoption the board of school trustees had not abused the discretion with which the law has clothed them for the management of the schools under their charge. The reply of general denial tendered an issue of fact, and the finding and judgment of the court against appellant, and the peremptory mandate commanding that the pupil be readmitted to the school, were an adjudication against appellant on that issue, and were, in substance, an adjudication that the answer was untrue, and that the pupil had not been suspended because of a violation of Rule 2, as therein alleged, but for some other cause. Whether the ruling on the demurrer to appellant's answer was right or wrong it was the law of the case, and so far as that case and the parties to that litigation were concerned, such ruling, while unreversed, was conclusive as to the reasonableness of Rule 2, and the right of the board of school trustees and appellant to suspend the relator's son for violating it.

The finding of the court upon which appellant was adjudged guilty of contempt shows that the acts constituting the alleged contempt were precisely such acts as the court had by its ruling on the demurrer said the appellant might lawfully do. No question is properly before this court as to the reasonableness or unreasonableness of the rule under which the pupil was suspended, nor was any such question properly before the circuit court. The only question to be considered here is, did the appellant violate the order in the second time suspending the pupil? What the court decided in the original case can only be determined from the record, and as above shown, the record discloses no such violation of that order.

The court erred in adjudging him guilty of contempt.

Judgment reversed, with costs.

Filed Feb. 17, 1891.

Kilgore v. Kilgore et al.

127 276
130 396

No. 14,637.

KILGORE v. KILGORE ET AL.

DECEDENTS' ESTATES.—*Law Favors Equal Distribution of Estate.—Per Stirpes or Per Capita.*—The law favors an equal distribution of an estate among the children of the deceased owner; and it favors a distribution between near and remote heirs *per stirpes* in preference to *per capita*.

WILL.—*Construction in Doubt.—Descent Given by Statute Preferred.*—If the intent of the testator is doubtful, and two constructions are applicable thereto, that construction will be adopted which casts the property where the law would cast it if no will had been executed.

SAME.—*Intent as to Particular Clause.—Entire Will Examined.*—In the construction of a clause of a will the court will look to the whole instrument, if, by so doing, any light will be thrown upon the particular clause in dispute or to be construed.

SAME.—*Construction.—Paramount Object.*—The paramount object in construing a will is to construe it so as to express the true intention and meaning of the testator.

SAME.—*Per Stirpes.—Per Capita.*—A will provided that after the death or marriage of the testator's wife, one-fourth part of his property should be "held" by his son, O., "during his natural life, and in case he should die leaving no child or children of his own, then said property to go to any surviving child or grandchildren, in equal parts."

Held, that such fourth part was vested in O. for and during his natural life; one-third of the remainder, real and personal, in K., the surviving son of the testator, O. dying childless; one-third in his two grandchildren, who were children of a deceased son of the testator, and the remaining third in another set of grandchildren, children of another deceased child of said testator; such grandchildren inheriting *per stirpes* and not *per capita*.

SAME.—*Property in Trust.—Remainder.*—A second clause provided that the testator's son, D., shall "have and hold" one-fourth of the testator's property "in trust (for his children now born, or which may hereafter be born), during his natural life," "with the right to use any income or rents of said property to aid in raising and educating said children," without bond, "but for any waste or abuse of trust [to] be removed, and another appointed by the court."

Held, that D. held and enjoyed this fourth part in trust for his children, born and to be born, for his natural life, subject to the trust and duty upon his part to appropriate so much of the rents, profits and income as was necessary for the purpose of raising and educating his children; that the remainder, in fee simple and absolutely, vested in D.'s children, then in being, subject to open and let in any other children born there-

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after to him; and that D. was not required to give bond, but might be removed for waste or breach of trust.

From the Delaware Circuit Court.

J. N. Temple, for appellant.

J. W. Ryan, for appellees.

OLDS, C. J.—This is an action by the appellant against the appellees to construe items four and five of the will of David Kilgore, deceased. These items are as follows:

“*Fourth.* After the death or marriage of my said wife, as the case may be, all my real and personal property shall be disposed of as follows: One-fourth part to be held by my son Obed during his natural life, and in case he should die leaving no child, or children, of his own, then said property to go to my surviving child or grandchildren in equal parts, no adopted child shall take any part thereof.

“*Fifth.* My son David to have and to hold in trust (for his children now born, or which may hereafter be born), during his natural life, one full equal fourth part of said property, real and personal, with the right to use any income or rents of said property, to aid in raising and educating said children, and he shall not be required to give bond as such trustee, but for any waste or abuse of trust be removed and another appointed by the court.”

Upon the trial of the cause below the court, by its finding, placed the following construction on said fourth and fifth items of said will:

“That the true meaning and construction of the fourth clause of the will of David Kilgore, deceased, set out in the complaint, is: That the portion of the estate of said David Kilgore, deceased, which is therein referred to, is vested in the defendant, Obed Kilgore, the son of said David Kilgore, for and during the term of his natural life, and no longer; that the remainder of said property, real and personal, is vested in the plaintiff, David Kilgore, the surviving son of said David Kilgore, deceased, and the defendants Charles

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W. Kilgore and Mary G. Davis, grandchildren of the said David Kilgore, deceased, by his deceased son Alfred Kilgore, and Albert Kilgore, Clarence Kilgore, and Frank Kilgore, grandchildren of said David Kilgore, deceased, by his deceased son Tecumseh Kilgore, as tenants in common ; one-third being vested in the plaintiff David Kilgore, one-third in the defendants Charles W. Kilgore and Mary G. Davis, jointly ; and one-third in the defendants Albert Kilgore, Clarence Kilgore and Frank Kilgore, jointly. Such remainder to said plaintiff and said defendants, subject, however, to be defeated in the event that at the death of said Obed Kilgore he shall leave surviving him a legitimate child, or children ; in which case such remainder in all said property shall vest, in fee simple and absolutely, in such child or children of said Obed Kilgore, to the exclusion of the plaintiff and the defendants above named, the children of Alfred Kilgore and Tecumseh Kilgore, deceased.

“Second. That the true intent and meaning of the fifth clause of said last will and testament of David Kilgore, deceased, is that the portion of the estate of said David Kilgore, therein referred to, shall be held and enjoyed by the plaintiff, David Kilgore, in trust for his children now born, or which may hereafter be born, for and during the term of his natural life, with the full right to him to use, enjoy and dispose of the rents, incomes, and profits thereof during his natural life ; subject, however, to the trust and duty upon his part to appropriate so much of such rents, profits, and incomes as may be necessary for the purpose of raising and educating his children, and that the remainder, in fee simple, of all said property, real and personal, is vested, in fee simple and absolutely, in the children of said David Kilgore now in being, the defendants Mary L. Connolly, Alfred Kilgore, Obed Kilgore, jr., and Byron Kilgore, subject to open up and let in any other children which shall be born to said David Kilgore ; and that said plaintiff, David Kilgore, is not required by said clause of said will to give any bond to se-

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cure the performance by him of the trust created by said clause, and is subject to removal by the court for waste or breach of trust."

It is contended by counsel for the appellant that the court erred in the construction of said clauses of the will in this, that the fee in the property devised by the fourth clause of the will vested in David Kilgore, the plaintiff (he being the only surviving child of said David Kilgore, deceased), subject to the life-estate of said Obed, subject to be divested upon Obed leaving surviving him a legitimate child or children, in which event such surviving child or children of Obed would take the fee. And that the fee in the property described in the fifth clause of the will vested in David Kilgore, the plaintiff, subject to being held in trust and applying a sufficient amount of the rents, profits and income of the same to raise and educate his children. It is further contended that if any of the grandchildren of the deceased take an interest in the fee by item four, the plaintiff's children, who are also grandchildren of deceased, take the same as the children of the two deceased sons.

The paramount object to be reached in the construction of a will by a court is to so construe it as to express the true intention and meaning of the testator. In many instances it is very difficult to accomplish this object to a degree approaching absolute certainty. Language is often used upon which there can very plausibly be placed different constructions, hence a court must adopt such construction as, under the rules of law governing the construction of wills, seems to it most reasonable.

It is a well established rule of law that in construing any portion or clause of a will the court will look to the whole instrument, if, by doing so, any light will be thrown upon the particular clause in dispute or to be construed, enabling the court to more clearly arrive at the true intention of the testator, and this often affords the most satisfactory evidence of the true intent of the testator.

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By the second item of the will of David Kilgore, deceased, he gave to his widow all of his property, real and personal, during the time she remained his widow. The third item makes special provision for the widow of his son, Tecumseh Kilgore, deceased.

By the first clause of item four he explicitly states his intention to dispose of all his estate, both real and personal, in the manner subsequently stated in the will.

By the sixth item he makes an absolute disposition of one-half of all his property, real and personal, to his grandchildren, the children of his deceased sons, Alfred and Tecumseh Kilgore.

By the seventh item he provides that if any of his children shall have made valuable improvements on any of his real estate, they shall be allowed full credit for such improvements.

By the eighth item he makes special bequests, and by the ninth item he provides that in case a fair distribution of his property can not be made otherwise, certain real estate be sold by his executors.

It appears from the record that the deceased had four sons, two of whom, Alfred and Tecumseh, had died previous to the time of the making of the will, each leaving children; that his sons David and Obed were living. David had children and Obed had no children.

By the first disposition of his property by the will one thing is clearly manifested, and that is that the testator's intention was to give to the children of Alfred and Tecumseh the equal one-half of his property, the children of each taking one-fourth. *Henry v. Thomas*, 118 Ind. 23. This being the intention and purpose of the testator, clearly expressed in the original division of the property, it must have some weight in construing a clause of the will making a further grant of the property bequeathed and devised to one son on failure of such son to leave children surviving at his death,

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in case the language used in making such further disposition be ambiguous or uncertain.

The law favors a distribution of estates under the rule giving to the child or children of a deceased such share as his parent would have taken if living, and this is in harmony with the disposition of the property to the children of the two deceased sons by the will under consideration, and did the will give to Obed Kilgore the absolute title in fee to the property, his father and mother being dead, should he die intestate, leaving no widow, David Kilgore, the plaintiff, would inherit one-third and the children of Alfred one-third and the children of Tecumseh one-third.

That part of item four which provides that "in case he (Obed) should die leaving no child or children of his own, then said property to go to my surviving child or grandchildren in equal parts," is of uncertain meaning. It provides it shall go to his child or to his grandchildren in equal parts, but to whom, the child, or the grandchildren? and to whom do the words "equal parts" relate? We may reason over the language, but in doing so and looking to it alone, the intent of the testator becomes more clouded and indistinct, and we are compelled to look beyond to ascertain his intent. The law favors a distribution between near and remote heirs *per stirpes* in preference to *per capita*.

The construction placed upon the fourth item of the will by the circuit court is in harmony with the intent of the testator as expressed in the first disposition of his property by the will, in giving to the children of Alfred and Tecumseh each one-fourth of his property. Having done so in the first instance it is but reasonable to infer and hold that, in the disposition of the one-fourth given to Obed on his failure to have children born to him, it was his intention that the children of each of the deceased sons should take the same share that David, the living son, should take.

It is further supported in that the construction casts the property where the law would cast it did they inherit either

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from the deceased, David Kilgore, or the devisee, Obed Kilgore, and this is sufficient to turn the scale in favor of such construction. *Henry v. Thomas, supra.* We are of the opinion that there was no error in the construction of the fourth item of the will.

As to the fifth item of the will it is conceded that it was the intention of the testator to make a full disposition of his property and to pass the title to either David or his children by this clause of the will. We do not think the contention of the appellant can be sustained, viz.: that it gives to David the fee in the property. There is no grant at all to David except to hold in trust for his children. And as it is not contended but that the children take the fee if David does not, it is unnecessary to discuss that feature of the question presented by this item.

It is further suggested that the decree is defective for the reason that in the complaint, in addition to setting out the contentions of the parties as to the construction of the will, it alleges that appellant is the absolute owner of the one-fourth, and that such contentions cast a cloud upon his title, which he asks to have removed and his title quieted, and that there is no formal adjudication upon the question of title. The sole question in controversy in the case is in regard to the construction to be placed upon the will. And the adjudication and settlement of that question dispose of all questions in the case, and we think the finding and judgment settles all questions in controversy.

There is no error in the record for which the judgment should be reversed.

Judgment affirmed, with costs.

Filed Dec. 18, 1890; petition for a rehearing overruled Feb. 17, 1891.

Fiscus *et al.* v. Fiscus.

No. 15,831.

FISCUS ET AL. v. FISCUS.

127	283
149	590
149	591

DECEDENTS' ESTATES.—*Distributee.*—*Indebtedness of to Estate.*—*Distributive Share.*—*Exemptions.*—A distributee against whom the administrator holds an unsatisfied judgment for a sum greater than the distributee's distributive share, is not entitled to such share, although, being a householder, the property owned by him is not equal to the amount allowed by law as exempt from execution. OLDS, C. J., dissents.

From the Decatur Circuit Court.

J. S. Scobey, for appellants.

W. A. Moore, for appellee.

COFFEY, J.—This was an application by the appellee against the appellants to compel a distribution of the estate of William Fiscus, deceased. The court overruled a demurrer to the petition, and the only error assigned relates to the correctness of this ruling.

The petition alleges, substantially, that the appellee is one of the seven heirs of the deceased, William Fiscus; that after the settlement of all claims against said estate, and the payment of the expenses of administration, there remains for distribution among the heirs the sum of \$2,500, derived from the sale of real estate; that in the year 1887 the administrator of said estate recovered a judgment in the Decatur Circuit Court against the appellee for the sum of \$1,610.17, which yet remains wholly unpaid; that the appellee is a resident householder of the State of Indiana, and has not, including his distributive share in said estate, property of the value of \$600.

With this petition the appellee filed an inventory and schedule of his property, and prayed that his interest in the estate be set apart to him free from the set-off existing by reason of the judgment in favor of the estate.

The only question in the case relates to the right of the

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appellee to share in the distribution of the estate before the judgment in favor of the estate is satisfied.

It has often been held by this court that one judgment can not be set off against another in a case where such set-off would have the effect to defeat the exemption laws of the State. *Puett v. Beard*, 86 Ind. 172; *Butner v. Bowser*, 104 Ind. 255; *Burdge v. Bolin*, 106 Ind. 175; *Junker v. Hustes*, 113 Ind. 524; *Carpenter v. Cool*, 115 Ind. 134.

In the case of *Smith v. Sills*, 126 Ind. 205, it was held by this court that a promissory note might be claimed as exempt from a set-off in favor of the maker when the holder of such note, being a householder, had not the quantity of property allowed by law as exempt from execution.

It is claimed by the appellee in this case that the same rule applies to his application to compel the administrator to pay over to him his distributive share of the estate named in his petition.

To determine this question it is necessary to inquire into the ground upon which the administrator has the right to retain in his hands the distributive share of an heir or a legacy due to a legatee, in satisfaction of a claim due to such estate from the heir or legatee.

In the case of *Fiscus v. Moore*, 121 Ind. 547, it was said by this court: "The ground upon which an administrator is entitled to retain so much of the distributive share of a distributee as will satisfy a debt due from the latter to the estate is, that the heir or distributee makes a demand upon the administrator in respect to assets in his hands as administrator, and the just and equitable answer in such a case is that the person making the demand has already in his hands assets belonging to the estate in excess of the distributive share which he is demanding."

The term "set-off," as used in this class of cases, is used inaccurately. It is not, in fact, a set-off, but it is the mere exercise of the right of the administrator to apply the funds in his hands to the payment of a debt due from the distrib-

Fiscus *et al.* v. Fiscus.

tee to the estate. *Cherry v. Boulbee*, 4 Mylne & Craig, 442.

The distributee is not entitled to his distributive share while he retains in his own hands a part of the fund out of which his share and other distributive shares should be paid. *Waterman Set-Off*, section 110; *Ranking v. Barnard*, 5 Madd. Ch. 28; *Koons v. Mellett*, 121 Ind. 585.

In this case the appellee has in his hands, of the assets belonging to the estate in which he claims a part, a sum largely in excess of his distributive share. We know of no rule of equity which would require the administrator of William Fiscus to deliver up to him one-seventh of the remainder. His pecuniary condition, we think, furnishes no sufficient reason for so doing. As soon as the administrator ascertained the amount which would be due the appellee as his distributive share in the estate of William Fiscus, it was his duty to apply such share to the debt due from the appellee to the estate. Assuming, as we will, in the absence of a showing to the contrary, that the administrator did his duty at the time this application was filed, there was nothing due the appellee.

The petition proceeds upon the theory that the distributive share of the appellee in the estate of William Fiscus remains in the hands of the administrator, unapplied to the payment of the debt due to the estate, and that by reason of the fact that the property owned by the appellee is not equal in value to the amount allowed by law as exempt from execution, he has the right to compel the payment to himself of the whole of his distributive share, thus leaving his debt to the estate wholly unpaid. Such a result would be inequitable; it would be equivalent to decreeing to the appellee more than a double share in the estate of William Fiscus, at the expense of the other heirs.

We are of the opinion that the appellee is not entitled to any portion of the estate while he holds in his hands assets belonging thereto which exceed the amount of his distributive share.

Craig et al. v. Frazier et al.

Judgment reversed, with directions to sustain the demurrer to the petition.

OLDS, C. J., dissents.

Filed Feb. 26, 1891.

127	286
128	288
127	289
131	226
127	286
140	306
127	286
149	406
127	286
163	115
127	286
164	429
127	286
165	676

No. 14,627.

CRAIG ET AL. v. FRAZIER ET AL.

PLEADING.—Answer.—General Denial.—When the general denial is pleaded no error is committed by sustaining a demurrer to an answer which sets up only such facts as are admissible in evidence under the general denial.

PRACTICE.—Instructions.—Exceptions to Parts.—Where instructions, taken as a whole, state the law of the case correctly, error in a single instruction, or a clause of an instruction, will not be available for a reversal of the judgment.

SUPREME COURT.—Request for Instructions.—Refusal of.—Available error can not be predicated on the refusal of a request for instructions where the record fails to show that the instructions were signed by the party, or his attorney, or that they were presented before the argument began.

From the Fountain Circuit Court.

J. W. Sutton and W. L. Rabourn, for appellants.

J. W. Macy, J. B. Jaqua, and C. V. McAdams, for appellees.

McBRIDE, J.—This was a suit by the appellees on a guardian's bond. Six breaches of the bond were assigned.

Appellants filed an answer in four paragraphs. The first paragraph was the general denial, and the fourth pleaded a settlement. The second and third paragraphs were partial answers, the second being addressed to the third and sixth alleged breaches of the bond, and the third paragraph being addressed to the fourth alleged breach thereof.

The court below sustained a demurrer to the second and third paragraphs of answer and this ruling is assigned as error.

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A third error is assigned, that the court erred in overruling appellants' motion for a new trial. The two partial answers above referred to, in so far as they plead material facts, plead nothing that could not be shown under the general denial. No available error was committed by this ruling. No citation of authorities is necessary on a question settled as this is.

Eight reasons were assigned for a new trial, but of these only three are discussed, the fifth, sixth and seventh. The fifth and sixth challenge the action of the court in giving certain instructions. The questions sought to be presented are not before us in such shape that we can consider them. The instructions given by the court are fourteen in number, and no exception is taken to any one instruction as an entirety. Instead of writing on the margin of the instruction complained of, "given and excepted to," and having the same signed by the judge, the appellants prepared and had signed by the judge, and filed, a formal bill of exceptions setting out the particular instructions which they insist are erroneous.

An examination of the instructions given by the court, as shown by the record, discloses the fact, as above stated, that appellants do not object to any single entire instruction, but to two clauses, taken from the instruction numbered six.

It has been repeatedly held by this court that instructions are not to be judged by detached clauses or sentences, but as entireties. *Nicoles v. Calvert*, 96 Ind. 316; *Wright v. Fansler*, 90 Ind. 492; *Louisville, etc., R. W. Co. v. Grantham*, 104 Ind. 353; *Town of Rushville v. Adams*, 107 Ind. 475; *Indiana, etc., R. W. Co. v. Cook*, 102 Ind. 133; *Cline v. Lindsey*, 110 Ind. 337. These authorities, with many others, settle this as the rule, not only as to detached clauses and sentences, in any given instruction, but also as to each instruction given singly. The court will look to all the instructions given, and it is sufficient if taken together they

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declare the law correctly. The instructions, taken as a whole, do state the law correctly.

The seventh and only remaining ground for a new trial was, that the court erred in refusing to give certain instructions asked by appellants. When the request for these instructions was made is not shown, save that it was at the trial of the cause. We are not informed, however, at what stage of the trial. The record also fails to show that they were signed by the parties asking to have them given, or by their attorneys. Unless they were presented before the argument began, and were signed, they were rightfully refused. *Puett v. Beard*, 86 Ind. 104; *Board, etc., v. Legg*, 110 Ind. 479; *Hutchinson v. Lemcke*, 107 Ind. 121; *McCammack v. McCammack*, 86 Ind. 387, and many other cases that might be cited.

The presumption of regularity in the proceedings of the trial court requires the complaining party to show affirmatively that he was denied some right. *Puett v. Beard, supra*.

One good reason is sufficient to sustain the action of the trial court, but we will add, in addition to the reasons above given, its ruling was clearly right upon the ground that the instructions which appellants asked the court to give did not state the law correctly.

We find nothing in the record justifying a reversal of the judgment; on the contrary, judging from the record, the court below treated appellants with great fairness. Their counsel seem to have been able and skilful, and to have given them the full benefit of their skill and ability. They have had the benefit of two jury trials, each resulting in a verdict against them, one in the county of their residence, and one in a neighboring county to which the venue of the cause was changed on their motion.

It appears from the evidence that the money in the guardian's hands was pension money, due to appellee as a soldier's orphan, and if the evidence is to be believed the verdict was clearly right.

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The judgment is affirmed, at appellants' costs, with ten per cent. damages.

Filed Feb. 25, 1891.

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No. 14,754.

PAXTON v. STERNE ET AL.

TITLE.—*Sheriff's Sale.—Relation Back to Date of Judgment.*—The title of a purchaser of land at a sheriff's sale relates back to the time the judgment became a lien on the land sold, and all the right and interest possessed by the judgment debtor at the date such judgment became a lien vest in the purchaser.

SAME.—*Color of.*—A sale on a school fund mortgage, though void, gives a color of title to the purchaser.

JUDGMENT.—Lien.—Defendant Having no Title to Land.—If the defendant has no legal title to the land the judgment against him is not a lien thereon.

SAME.—Extent of Lien.—A judgment is a lien only upon the debtor's interest in the land sought to be subjected to it.

EQUAL EQUITIES.—Priority of Time.—If the equities of two parties are equal, the one first in point of time is the superior one.

SUBROGATION.—Sale on Execution.—A purchaser at a sheriff's sale acquires by subrogation the rights of the judgment plaintiff or execution creditor in the event that the sale is ineffective to convey title.

SAME.—Prior Equity.—In 1859 F., the owner of certain real estate, mortgaged it to the State for the benefit of the school fund. In 1871 F. mortgaged the land to S., and the mortgage was foreclosed, but no sale was made on the decree. One month after such foreclosure the auditor sold the land by virtue of the school fund mortgage, and executed a deed to the purchaser, S. One year previous to such foreclosure six judgments were rendered against S. for a total sum of \$20,000; executions were issued and levied upon the land. One year after the foreclosure the land was sold to L. on one of these executions, and he assigned the certificate of sale to J., and J. took out a sheriff's deed thereon at the expiration of the year of redemption. Eight months after the foreclosure S. executed a mortgage to M., trustee, of which mortgage P. became the owner by assignment. Seven years after such foreclosure F. executed a quitclaim deed to U., who afterwards brought suit to set aside the sale under the school fund mortgage, and succeeded

197	280
197	271
197	401
197	286
131	227
131	554
127	289
134	248
127	280
146	51

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in obtaining a decree allowing him to redeem from it. A redemption was made by him, he paying the money into court.

Held, that J., and not P., was entitled to the money, upon the ground that their equities being equal, the one prior in point of time was entitled to preference.

From the Gibson Circuit Court.

T. R. Paxton, for appellant.

J. E. McCullough, J. H. Miller and C. A. Buskirk, for appellees.

ELLIOTT, J.—On the 17th day of June, 1859, James H. Fentress owned the real estate involved in this controversy, and on that day mortgaged it to the State of Indiana for the benefit of the school fund. On the 27th day of March, 1876, the auditor sold the land, and executed a deed to Samuel Sterne. Prior to the sale on the school fund mortgage, April 19th, 1871, James A. Fentress mortgaged the land to Samuel Sterne, and on the 10th day of February, 1876, this mortgage was foreclosed, but no sale was made on this decree. On the 2d day of February, 1875, six judgments were rendered against Samuel Sterne, amounting in the aggregate to more than \$20,000, and the executions issued on these judgments were levied on the land. On the 5th day of May, 1877, the land was sold to Peter E. LaPlant, and he assigned the certificate issued to him by the sheriff to John R. Sterne, to whom the sheriff executed a deed in due time. On the 12th day of September, 1876, Samuel Sterne executed a mortgage to Thomas Maddox, trustee, of which mortgage Paxton, the appellant, became the owner by assignment. On the 24th day of August, 1883, one of the appellees received a quit-claim deed from James H. Fentress. Subsequently that appellee brought this suit to set aside the sale under the school fund mortgage, and he succeeded in obtaining a decree allowing him to redeem from the mortgage. Under the decree a redemption was made, and the redemptioner paid into court \$1,456.85, and the appellant claims that he is entitled

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to such a portion of it as equals the amount of his claim under the mortgage assigned to him by *Maddox*; but the court decided against him, holding that the grantee of the sheriff, under the sale made upon the judgments against *Samuel Sterne*, was entitled to the money.

The sheriff's grantee, *John R. Sterne*, acquired title, if he acquired title at all, on the day the judgments upon which the sale was made were entered, for it is well settled that the title of the purchaser of land at a sheriff's sale relates back to the time the judgment lien became effective. This doctrine of relation carries back the title so as to vest in the purchaser all the right and interest the judgment debtor possessed in the land at the time the judgment fastened upon it. *Orth v. Jennings*, 8 Blackf. 420; *Bellows v. McGinnis*, 17 Ind. 64; *Ashley v. Eberts*, 22 Ind. 55; *Sumner v. Coleman*, 23 Ind. 91; *Steeple v. Downing*, 60 Ind. 478; *Hollenback v. Blackmore*, 70 Ind. 234; *Elliott v. Cale*, 80 Ind. 285; *Wright v. Tichenor*, 104 Ind. 185.

If any right or interest vested in the purchaser at the sheriff's sale, then it must prevail over the claim of the appellant, for the judgments were prior in time to the lien of his mortgage, and it is a very ancient maxim that, "Where equities are equal, the order is time."

The contention of the appellant is that as the judgment debtor had no legal title the judgments never became liens. This is undoubtedly the general rule. *Modisett v. Johnson*, 2 Blackf. 431; *Orth v. Jennings*, *supra*; *Gentry v. Allison*, 20 Ind. 481; *Terrell v. Prestel*, 68 Ind. 86; *Conner v. Wells*, 91 Ind. 197.

It is, also, the established general rule that a judgment is a lien only upon the debtor's interest in the land. *Shirk v. Thomas*, 121 Ind. 147. If this case falls within these rules it must be held that the judgment is erroneous; but it can not be assumed, as of course, that it does fall within those rules, for the case possesses features which distinguish it from the cases which those rules ordinarily govern.

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It is important to note the peculiar features of this case before proceeding farther. Samuel Sterne, through whom both parties claim, had an apparent title, for the sale on the school fund mortgage gave him at least color of title, and his apparent title was a legal one, which, by lapse of time, would have ripened into a title in fee simple. *Bell v. Longworth*, 6 Ind. 273; *Vancleave v. Milliken*, 13 Ind. 105; *Brenner v. Quick*, 88 Ind. 546; *Sims v. Gay*, 109 Ind. 501; *McWhorter v. Heltzell*, 124 Ind. 129; *Riggs v. Riley*, 113 Ind. 208; *Sims v. City of Frankfort*, 79 Ind. 446. But Samuel Sterne had more than an apparent title under the sale upon the school fund mortgage, for he had a decree upon a mortgage executed to him by Fentress, the original owner, to whom all the parties trace their title. It is evident, therefore, that the purchaser at the execution sale acquired some rights, since, if he acquired no greater rights, he, at least, became subrogated to the rights of the execution creditors.

That a purchaser at a sheriff's sale acquires by subrogation the rights of the judgment plaintiff in the event that the sale is ineffective to convey title is affirmed by our statute and asserted by our decisions. *Gillette v. Hill*, 102 Ind. 531; *Bodkin v. Merit*, 102 Ind. 293; *Short v. Sears*, 93 Ind. 505, and authorities cited. As the purchaser acquired some rights by his purchase from the sale, it remains to inquire whether they are superior to those of the appellant.

The right of the appellant, vested in him as the assignee of the Maddox mortgage, is not a right to the land, for the mortgagor, Samuel Sterne, did not become the owner of the land, inasmuch as the sale which vested an apparent title in him was adjudged ineffective. If the mortgagor did not have the legal title he could not mortgage it, and the most that can be said is that the mortgage conveyed the equitable interest of the mortgagor, so that the only interest of the appellant is an equitable one. But if the appellant has an equitable interest, so, also, has John R. Sterne. As both parties have an equitable interest, then, since that of John

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R. Sterne is first in point of time, it is, under the maxim we have quoted, superior in equity.

The truth is that neither of the parties has a legal title to land, or even an equitable right to land; both have equitable claims, but not upon the land. Both are following the proceeds of land, and both are, therefore, invoking the aid of a court of equity. Their rights are to be determined by the rules of equity, and only equity can give them relief, for it is under the rules of equity that they must follow the proceeds of the land. The land has been converted into a fund, and that fund is in the hands of a court of chancery, to be distributed as equity and good conscience require, so that the question is, not whether the one party has a strict legal right, for neither has that, but the question is, which has the superior equitable claim? We have no doubt that the equities of John R. Sterne are paramount.

Judgment affirmed.

Filed Jan. 27, 1891; petition for a rehearing overruled March 31, 1891.

127 288
132 19

No. 14,771.

TAYLOR ET AL. v. BROWN.

DRAINAGE.—Repairs.—Assessments.—Appeal.—Evidence.—Under section 1193, Elliott's Supp., relating to the repair of ditches by the county surveyor, on an appeal to the circuit court from an assessment made by the county surveyor, apportioning the expense of repairing a ditch, evidence that the money expended by the surveyor was for excavating and repairing a ditch on a different line from that designated in the original specifications, is admissible.

From the La Grange Circuit Court.

O. L. Ballou, for appellants.

J. D. Ferrall, J. S. Drake and F. D. Merritt, for appellee.

Taylor *et al.* v. Brown.

OLDS, C. J.—This is an appeal taken from an assessment made by the surveyor of La Grange county, apportioning the expense of cleaning out a ditch, which ditch, it is contended by the appellants, was formerly constructed under an order of the board of commissioners of the county.

There was a trial had in the circuit court, and a special finding of facts made by the court, and conclusions of law stated. Appellants filed a motion for a new trial, which was overruled; also, made a motion to modify the judgment, which was overruled. Exceptions were reserved, and the rulings of the court in overruling the motions for a new trial and to modify the judgment, are assigned as error.

Counsel for appellants discusses the questions presented by the assignments of error, together with some questions not presented.

The questions presented by the assignment of errors relate to the right of the circuit court on appeal to hear evidence and determine whether the amounts assessed by the county surveyor against the persons appealing is, in fact, the amount expended for the repairing of a ditch theretofore constructed, for which their lands were assessed as authorized by the statute. Section 1193, Elliott's Supp., makes it the duty of the county surveyor to clean out the ditch and keep it in repair to the full dimensions, as to width and depth, as required by the original specifications for the construction of such ditch, and certify the cost thereof to the county auditor, and to apportion and assess the cost to the lands adjudged benefited by the ditch. It authorizes an appeal to the circuit court, and it provides that the only question to be tried on appeal should be to determine the cost of such repairs, and what amount thereof should be assessed against the appellant's land.

To try and determine the costs of such repairs necessarily involves the necessity of the court to determine whether or not the amount apportioned and assessed against the land was for repairs to any ditch theretofore constructed by pro-

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ceedings had in the county. If the amount was expended for some purpose other than repairs to and in keeping a ditch, for which the lands of the parties were assessed, in repair to the full dimensions as to width and depth as required in the original specifications, then there are no costs of repairs chargeable against the lands. So it is proper for the court to hear evidence showing what the amount charged against the lands of parties assessed for the construction of a ditch was expended for, and, if expended for some purpose other than repairing the ditch, constructed in pursuance of proper legal proceedings, then it should be disallowed. The surveyor has no authority to expend money for other purposes or for constructing and excavating a ditch in another and different place from the line upon which it was originally located and charge the same up as costs of repairs and assess them against the lands assessed for the original construction of a ditch. The surveyor is charged with keeping ditches in repair after they are once constructed, and he determines the necessity of making the repairs, but he has no discretion in the expenditure of money. He can only expend it to keep such a ditch in repair to the full dimensions, as to width and depth, as required in the original specifications, and he has no discretion which allows him to change the location and do work in a different way or manner from that designated in the original specification.

The testimony was properly admitted in this case to show that the money expended by the surveyor was for excavating and repairing a ditch on a different line from that designated in the original specifications, and the evidence tended to support the finding of the court, and this court will not disturb it. *Weaver v. Tempelin*, 113 Ind. 298; *Fries v. Brier*, 111 Ind. 65.

The court did not err in overruling the motion to modify the judgment, and there is no error in the record.

Judgment affirmed at costs of appellant.

Filed Feb. 19, 1891.

Dixon, Sheriff, et al. v. Aldrich et al.

No. 14,580.

DIXON, SHERIFF, ET AL. v. ALDRICH ET AL.

WIDOW.—Award.—May be Claimed out of Property Levied on in Husband's Lifetime.—The right of the widow to the five hundred dollars allowed her by section 2289, R. S. 1881, is not defeated by a levy made by the sheriff on the property of her deceased husband in his lifetime.

From the Posey Circuit Court.

E. D. Owen, for appellants.

W. P. Edson, for appellees.

ELLIOTT, J.—The question presented by this record is this: Can a widow secure the five hundred dollars allowed her by statute where the property of her deceased husband is held under a levy made by the sheriff before the husband's death?

This question must be answered in the affirmative. The levy did not change the title to the property, that still remained in the husband. He was the owner notwithstanding the levy, and he might have successfully claimed an amount equal in value to six hundred dollars as exempt from execution. He had not parted with the title, nor surrendered ownership, so that the decisions in such cases as *Recker v. Kilgore*, 62 Ind. 10, are not of controlling influence. The decision in *Quakenbush v. Taylor*, 86 Ind. 270, is not unfavorable to the widow's claim, although it is probable that some expressions in the opinion seem to be against it; but such expressions are not authoritative; especially do such expressions lack authority when, as is true of the case referred to, there are inconsistent statements in the opinion.

The statute which gives the widow the right to five hundred dollars is clear and comprehensive, and it expresses the intention of the Legislature to give her that sum out of property of which her husband died the owner, and which he might, if living, have exempted from sale on ex-

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ecution. Section 2269, R. S. 1881. In the statute relating to executions is the following section: "The death of a defendant, after the execution is placed in the hands of the sheriff to be executed, shall not affect his proceedings thereon, except that the amount of property allowed absolutely to the widow of the decedent shall be exempt from levy and sale under such execution." Section 790, R. S. 1881. This provision must be read in connection with that which secures to the widow five hundred dollars; and, when thus read, it forbids a sale although there may have been a levy in the lifetime of the husband. It seems to us that it is impossible to avoid the conclusion that the Legislature meant to secure to the widow five hundred dollars in all cases where the husband has not, in his lifetime, by a voluntary contract divested himself of ownership, or so encumbered the title as to destroy the right of exemption.

Judgment affirmed.

Filed Feb. 25, 1891.

No. 15,700.

EVERSOLE v. CHASE, ASSIGNEE.

LABOR.—*Preferred Claim.—Assignment for Benefit of Creditors.—Act of March 3d, 1885, Unrepealed.*—The act of March 3d, 1885 (Acts 1885, p. 36), which provides that all debts due any persons for manual or mechanical labor shall be a preferred claim in all cases against any individual, co-partnership, etc., where the property shall pass into the hands of an assignee or receiver, was not repealed by the act of March 17th, 1885 (Acts 1885, p. 95), and is in full force.

From the Cass Circuit Court.

D. D. Dykeman, W. T. Wilson and G. C. Taber, for appellant.

D. H. Chase, for appellee.

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OLDS, C. J.—As shown by the special finding of facts the appellant worked at mechanical and manual labor as an employee and journeyman repairer for the appellee's insolvent, who kept a jewelry store and did a general business of repairing watches, clocks and jewelry, in a store-room in Logansport; that he worked from July 6th, 1887, to July 6th, 1888, at the stipulated price of \$35 per month, and from July 6th, 1888, to September 26th, 1889, at the stipulated price of \$50 per month, at which latter date his employer, Henry C. Eversole, made an assignment of all his property for the benefit of his creditors to the appellee; that the appellee has taken possession of all of said insolvent's property, and as such assignee has converted all the machinery, tools, stock of materials, and work finished and unfinished into money, and now has in his hands funds arising from said sale more than sufficient to pay the appellant's claim in full.

The court found for the appellant that there was due to him \$946.13 for his labor. As a conclusion of law from the facts found the court stated that appellant was entitled to judgment against the insolvent's estate for \$946.13, and was only entitled to \$50 of said sum as a preferred claim.

The appellant excepted to the conclusion of law stating that only \$50 was a preferred claim, and moved the court to modify the judgment so as to make the whole amount a preferred claim, which motion was overruled and exceptions reserved.

As to whether or not the appellant's claim is all a preferred claim depends upon whether the statute, approved March 3d, 1885; Elliott's Supp., sections 1596, 1597 and 1598, is in force. Section 1598 of this statute provides that "All debts due any persons for manual or mechanical labor shall be a preferred claim in all cases against any individual, co-partnership, corporation or joint stock company, where the property thereof shall pass into the hands of an assignee or receiver, and such assignee or receiver, in the distribution

Eversole v. Chase, Assignee.

and payment of the debts, shall be required to first pay in full all debts due for manual or mechanical labor before paying any other, except the legitimate costs and expenses."

The appellant's claim is for both manual and mechanical labor, and is against an estate in the hands of an assignee, so that if the statute be in force the appellant's claim is all a preferred claim.

We are not favored with a brief on behalf of the appellee, and hence are not advised as to the theory entertained by him upon which the rulings should be upheld.

It is suggested by counsel for the appellant that the rulings were based upon the theory that the statute referred to is not in force, but is repealed by the act approved March 17th, 1885 (Elliott's Supp., section 1605), for the reason that the last named act is in conflict and repugnant to the former act.

We do not think this theory can be maintained.

The act approved March 17th, 1885, amends section 1 of an act approved March 29th, 1879, being section 5206, R. S. 1881, and the only change made by the amendment is by adding after the word "mechanical" the words "agricultural or other business or employment."

If the act approved March 17th, 1885, be antagonistic to the act approved March 3d, 1885, and could be said to repeal it, then the same would be true of the last named act, and the act approved March 29th, 1879. So that applying the rule by which it is contended that the act approved March 3d, 1885, is repealed, the act of March 29th, 1879, would be repealed by the act of March 3d, 1885, and it could not be amended, for certainly there is the same antagonism existing between the act of March 29th, 1879, and the act of March 3d, 1885, as there is between the last named act and the act of March 17th, 1885. It is certain, therefore, that by this rule of construction the act approved March 3d, 1885, is in force, and it is unnecessary to determine in this action whether the act approved March 17th, 1885, is in force or not, for the

Voorhees *et al.* v. Carpenter.

act of March 3d, 1885, being in force, it governs this case, and the appellant is entitled to have his full claim declared a preferred claim.

A statute can not be sustained as an amendatory statute which purports to amend a statute which had no existence. *Draper v. Falley*, 33 Ind. 465; *Blakemore v. Dolan*, 50 Ind. 194; *Brocaw v. Board, etc.*, 73 Ind. 543. See, also, *Wright v. Board, etc.*, 82 Ind. 335.

A statute which is repealed by implication has no more existence than if repealed by direct words of a subsequent act of the Legislature, and hence an act purporting to amend an act repealed by implication has no more validity than if it purported to amend an act which had theretofore been repealed by a direct repealing clause in a statute.

The court erred in its conclusions of law.

Judgment reversed, at costs of appellee, with instructions to the circuit court to re-state its conclusions of law in accordance with this opinion, allowing all of plaintiff's claim as a preferred claim, and for judgment accordingly.

Filed Feb. 26, 1891.

127	300
133	280
127	300
137	285
127	300
141	356
143	539
127	300
144	207
127	300
149	582
127	300
153	7
153	435
127	300
157	689
127	300
162	391

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No. 14,649.

VOORHEES ET AL. v. CARPENTER.

FRAUDULENT CONVEYANCE.—Action to Set Aside.—Rights of Creditors.—A creditor can not maintain for his own benefit a suit to set aside a fraudulent conveyance made by a debtor who afterwards executes a voluntary assignment for the benefit of creditors where the trust is accepted and fully administered, although neither the assignee nor the creditor has any knowledge of the fraudulent conveyance until after the final settlement of the trust and the discharge of the assignee.

From the Fountain Circuit Court.

T. F. Davidson, for appellants.

H. H. Dochterman, for appellee.

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ELLIOTT, J.—The course pursued in argument narrows this controversy to a single controlling question, which may be stated thus: Can a creditor maintain a suit to set aside a fraudulent conveyance made by a debtor who afterwards executes a voluntary assignment for the benefit of creditors in a case where the trust is accepted and fully administered, but where neither the assignee nor the creditor has any knowledge of the fraudulent conveyance until after the final settlement of the trust and the discharge of the assignee?

The initial proposition is free from difficulty, for it is established law that an assignment, under the statute, for the benefit of creditors, vests in the assignee the right to set aside fraudulent conveyances executed by the assignor. *Cooper v. Perdue*, 114 Ind. 207; *Seibert v. Milligan*, 110 Ind. 106; *Simpson v. Warren*, 55 Me. 18; *Pillebury v. Kingon*, 33 N. J. Eq. 287 (36 Am. R. 556); *Klapps v. Shirk*, 13 Pa. St. 589; *Thomas v. Talmadge*, 16 Ohio St. 433.

A corollary of this initial proposition is that property fraudulently conveyed vests in the assignee, and he—not the creditors—can maintain a suit to set aside the conveyance. *Seibert v. Milligan*, *suprā*; *Hasseld v. Seyfort*, 105 Ind. 534; *Lord v. Fisher*, 19 Ind. 7; *Hallowell v. Bayliess*, 10 Ohio St. 536.

The effect of these settled principles is that the assignee must, as a general rule, bring the suit to set aside the fraudulent conveyance, and this general rule must govern here unless there are peculiar elements taking this case out of that rule. The only fact that can give plausibility to the contention that the case is not within the general rule is the fact that there was no discovery of the fraudulent conveyance until after the trust had been closed and the assignee discharged.

It can not be doubted that the final order adjudging that the trust had been settled and directing a discharge of the assignee put an end to his authority. *Morrill v. Dunn*, 39 Maine, 281. But it does not follow that the termination of

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the assignee's authority vested or revived the right of a creditor to subject property, which ought to have been included in the trust, to sale for the payment of his own debt. The point which requires elucidation is not one concerning the right of a creditor to bring suit to reopen the trust or to secure the appointment of a new trustee, but it is one involving the right of a creditor to secure for his own benefit property which ought to have gone into the trust, and which would have gone there had not the wrong of the debtor in concealing the fraudulent conveyance kept it from the hands of the assignee. The case before us is, it is very evident, entirely different from one in which a creditor seeks to uncover a fraudulent conveyance and make the property available for the benefit of all creditors. That end could doubtless be attained by a proper application to a court of equity, but we have here no question as to the right to appoint a new trustee or reinstate the old one; the question we have here is a radically different one.

The decisions to which we have referred declare that a voluntary assignment must be so administered as to put creditors upon an equality. It is the duty of the assignee to use all lawful means to secure the property of the debtor and apply it to the payment of creditors. The theory of the law regulating voluntary assignments for the benefit of creditors is, that all of the debtor's property shall go into the trust and pass into the hands of his assignee. After the assignment takes effect the right of creditors to seize the property of the debtor is, as a general rule, at an end, for the assignee becomes their representative for the purpose of securing assets and collecting claims. The debtor does not, in any sense, constitute the assignee his agent; on the contrary, the deed of assignment creates an irrevocable trust for the benefit of creditors, and the trust becomes one to be administered under the supervision and control of a court of equity. *Moses v. Mugatroyd*, 1 Johns. Ch. 119; *Shepherd v. McEvers*, 4 Johns. Ch. 136; *Ward v. Lewis*, 4 Pick. 518; *Pingree v.*

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Comstock, 18 Pick. 46; *Read v. Robinson*, 6 Watts & S. 329; *Ingram v. Kirkpatrick*, 6 Iredell Eq. 463; *Stimpson v. Fries*, 2 Jones Eq. 156. As the assignee is, in the true sense, a trustee, it is entirely consistent with principle to hold that he is the representative of the beneficiaries and not of the creator of the trust. So it is held by many courts. *Ware v. Gardner*, L. R. 7 Eq. 317; *Doe v. Ball*, 11 M. & W. 531; *Holmes v. Penney*, 3 Kay & J. 90; *Root v. Potter*, 59 Mich. 498; *Ceineman v. Hart*, 55 Mich. 64; *Robinson v. Bliss*, 121 Mass. 428.

It has been held, in well-reasoned opinions, by the Supreme Court of Massachusetts, that an assignee may elect to confirm or to repudiate a fraudulent conveyance. *Freeland v. Freeland*, 102 Mass. 475; *Harvey v. Varney*, 98 Mass. 118; *Snow v. Lang*, 2 Allen, 18; *Butler v. Hildreth*, 5 Met. 49. If this be the law, then it would seem clear that a creditor has no right to proceed against property fraudulently conveyed, since that right passes from the creditor and lodges in the assignee. But, aside from this consideration, the conclusion must be, that the trustee is alone invested with the right to set aside a fraudulent conveyance after the trust has once become effective, for the reason that when the trust is once established it fastens upon all property subject to the claims of creditors. Once trust property it must remain trust property. As trust property it is property in which all the beneficiaries have an interest, and which no one creditor can appropriate to his exclusive benefit. He may have it brought into the trust, but he can not secure it and exclude other beneficiaries whose rights and equities are equal. Creditors are not remediless where the trust has been closed, although no one of them may be entitled to sue for his individual benefit, for equity, acting upon the maxim that a trust will not be allowed to fail for want of a trustee, will, on a proper application, appoint a trustee to execute the unexecuted trust. But, it is hardly necessary to suggest, it is one thing to appoint a trustee to execute a trust by securing

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property fraudulently conveyed by the debtor, and quite another thing to permit one creditor to secure for his own benefit the debtor's property to the exclusion of other creditors. The conclusion which sound principle requires, is that what was once trust property continues to be such as long as it is within the power of equity to reach it for the beneficiaries, and that they may reach it by the intervention of a trustee as long as any right to it remains unextinguished. Just effect can not be given to our statute upon any other theory than that embodied in the conclusion stated. If it be held that one creditor may appropriate to his exclusive benefit property fraudulently conveyed by the debtor, the result is that what the statute makes trust property is not trust property. But, more than this, if it be held that what was trust property ceases to be such upon the discharge of the assignee, the way is opened for fraud, inasmuch as such a rule would enable one creditor to lie by and secure an undue advantage, and thus by indirect means defeat the principal object of the statute—that of securing an equal distribution of the debtor's property among all of his creditors.

Our conclusion finds support in analogous cases. It has been held by the Supreme Court of the United States that the failure of an assignee in bankruptcy to bring suit to set aside a fraudulent conveyance within the time limited will not confer upon creditors a right to bring such a suit. *Trimble v. Woodhead*, 102 U. S. 647; *Moyer v. Dewey*, 103 U. S. 301. Our own cases are, in principle, in harmony with our conclusion, for they affirm that where the debtor's property passes into a trust it is there for all the beneficiaries, and there it remains until the claims of the beneficiaries are provided for in due course of law. *Vestal v. Allen*, 94 Ind. 268, and cases cited; *Blair v. Hanna*, 87 Ind. 298; *Barton v. Bryant*, 2 Ind. 189; *Carr v. Huette*, 73 Ind. 378; *Butler v. Jaffray*, 12 Ind. 504; *Northwestern Conference, etc., v. Myers*, 36 Ind. 375. Other courts assert a similar doctrine. *Matter*

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of Assignment of Holbrook, 99 N. Y. 539; *Batten v. Smith*, 62 Wis. 92; *Schaller v. Wright*, 70 Iowa, 667.

The complaint of the appellant does not charge that there was any collusion between the assignee and the debtor, nor does it charge that there was any refusal to bring suit to set aside the fraudulent conveyance. It proceeds from first to last upon an entirely different theory, for the theory of the pleader is, that upon the close of the trust the appellant had a right to secure the property fraudulently conveyed for his own benefit. The decision in *Wright v. Mack*, 95 Ind. 332, lends no support to the appellant, for in that case there was a wrongful refusal to sue on the part of the assignee and all of the creditors united in the suit. If all the creditors were here there would be some resemblance between the two cases, but here the plaintiff, instead of bringing all of the creditors into court in order to make them participants in the benefits sought to be secured, seeks to exclude all others from sharing those benefits with him.

It may be said with propriety, although there may be no necessity for the express statement, since the proposition expressed is self-evident, that the important factor in this case is that there was a voluntary assignment, carrying all the debtor's property into the trust for the benefit of all the creditors. This factor exerts an important influence, inasmuch as it fastens upon the debtor's property a trust which no one creditor can displace. It may, in the appropriate proceeding, be reached as trust property, but not as individual property for the exclusive benefit of a single creditor.

It is not necessary, nor, indeed, proper, for us to decide what effect should be given the order closing the trust if the case were one wherein a creditor was asking the appointment of a trustee, and seeking to secure the property fraudulently conveyed for the benefit of all the beneficiaries of the trust, since we have here no such case. All that we do decide, or that we can properly decide, is that the theory upon which the ap-

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pellant proceeds is untenable, inasmuch as he seeks to seize the property fraudulently conveyed for his exclusive benefit, and does not bring other beneficiaries into court, nor sue in their behalf. As we have often decided, a plaintiff must succeed upon the theory he adopts or not succeed at all.

Judgment affirmed.

Filed Feb. 26, 1891.

No. 14,818.

STATE, EX REL. EGAN, v. WOLEVER ET AL.

JUDGE.—*Inferior Court.*—A judge or magistrate of a court of inferior jurisdiction, acting in a matter which is within his jurisdiction, is entitled to the same immunity accorded to a judge of a court of general jurisdiction.

SAME.—In such a case, a judge or a magistrate of a court of limited jurisdiction is acting within his jurisdiction if the court, over which he presides, has jurisdiction of the subject-matter, and he has acquired jurisdiction of the persons of the parties litigant.

SAME.—A court of limited jurisdiction has jurisdiction of the subject-matter in a given case if it has jurisdiction of the class of cases to which the particular case belongs.

SAME.—A magistrate or a judge of any court, whether of general or of limited jurisdiction, only exceeds his jurisdiction so as to incur civil liability where he acts wholly without jurisdiction, and where the authority which he assumes to exercise is a usurped authority.

SAME.—Where a court of limited jurisdiction has jurisdiction in a given cause of both subject-matter and of the parties, an application for a change of venue, properly made and erroneously refused, will not render the judge or magistrate liable for thereafter assuming to retain jurisdiction and dispose of the case.

SAME.—Deciding a motion for a change of venue is a judicial act, and the immunity accorded for such decision extends to the consequences legitimately flowing therefrom.

SAME.—*Mayor.*—*Change of Venue Denied.*—*Civil Liability.*—A mayor who maliciously, or corruptly, refuses to grant a change of venue, upon proper application made, in a case pending before him, is not liable, civilly, to the person applying for it, although such person be fined and imprisoned as a result of the trial. *Dichterle v. Schau*, 43 Ind. 175; *Barkeloo v. Randall*, 4 Blackf. 476; *Krulz v. Howard*, 70 Ind. 174, doubted.

From the Tippecanoe Circuit Court.

R. C. Pollard and C. R. Pollard, for appellant.

L. D. Boyd and R. P. Davidson, for appellees.

MCBRIDE.—This was a suit by appellant for false imprisonment against Andrew W. Wolever, as mayor of the city of Delphi, and Allen M. Eldridge and Henry H. Montman, sureties on his official bond.

Appellant was brought before the mayor for trial, charged

127	306
130	410
130	490
130	517
127	306
131	333
131	490
132	104
132	251
127	306
142	343
127	306
145	307
127	306
152	578
127	306
154	112
156	39

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with unlawfully selling intoxicating liquors to a minor. He was prosecuted by the name of James Aikens, and on being arraigned entered a plea of not guilty.

He then asked for a change of venue from the court. This was not granted him, and the court proceeded to hear and determine the case. He was adjudged guilty, and fined \$20 and costs. In default of payment he was committed to jail, where he remained one day, and then, to secure his release, paid the fine and costs, amounting to \$30.80.

Appellant bases his right to recover on the failure of the court to grant him a change of venue, and on the circumstances connected therewith. The complaint was in four paragraphs, and the court below sustained a separate demurrer to each paragraph upon the ground that it did not state facts sufficient to constitute a cause of action. An exception to this ruling, properly saved, presents the only questions in the record.

Omitting prefatory and technical averments, the facts constituting the alleged false imprisonment are stated in the first paragraph of the complaint as follows:

“That on the 19th day of December, 1887, the relator, Mike Egan, was brought before said defendant, Andrew W. Wolever, upon a warrant issued by him, as such mayor, against the relator by the name of ‘James Aikens,’ upon the charge of unlawfully selling liquor to a minor, and was compelled and required to plead to said charge. Whereupon he pleaded not guilty, and knowing that the issue thus made could not be fairly tried before the defendant, Andrew W. Wolever, because of the bias and prejudice of the said Wolever against every one who is charged with unlawfully selling intoxicating liquors, and knowing that the defendant, Wolever, entertained malice towards all who are engaged in the lawful business of selling intoxicating liquors, and being unwilling to subject himself to the peril of an unjust, unfair and prejudiced trial of the charge against him, before the

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trial of said cause began, he made and subscribed an affidavit in the words and figures following:

““STATE OF INDIANA, CARROLL COUNTY.
““STATE OF INDIANA } vs.
MIKE EGAN. } *Affidavit for Change of Venue.*

“ ‘The defendant, Mike Egau, being first duly sworn, says that he can not have a fair and impartial trial in said cause before the mayor, Andrew Wolever, on the account of his prejudice against said defendant and his defence to said action.

"And having made and subscribed said affidavit, he requested the defendant, Andrew W. Wolever, said mayor, to swear him to said affidavit, to permit him to file the same, and thereupon to grant him a change of venue; but said defendant, Wolever, acting as such mayor, refused to swear him to said affidavit, refused to file the same and refused to grant him a change of venue, and proceeded to try and convict relator of the offence with which he was charged, and to inflict punishment upon him therefor. That in so acting the defendant, Wolever, acted unlawfully, maliciously and corruptly, well knowing his duty to swear the relator to said affidavit, and that the same, when sworn to, was sufficient to compel a change of venue, well knowing the relator's right to apply for a change of venue; that this relator is the very person who was brought before the defendant, Wolever, by virtue of said warrant, the only person who pleaded to the charge embraced in said warrant, and the affidavit upon which it issued, and was known to the defendant, Wolever, to be such person."

The second paragraph, in addition, charges that the appellee having in said cause found appellant guilty as charged, adjudged, as his punishment, that "he make his fine to the State of Indiana in the sum of twenty dollars, and that he be imprisoned in the jail of Carroll county for _____ days.

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and that he pay the costs of the prosecution, and stand committed until said fine and costs are paid or replevied."

Said paragraph then proceeds as follows: "And adjudged no other punishment or penalty whatever; and because the relator was unable to pay said fine and costs the defendant, Wolever, still acting as such mayor, issued his *mittimus* to the jailer of Carroll county, Indiana, in which said defendant, Wolever, falsely, maliciously, knowingly and corruptly, recited and declared that in default of payment of such judgment, or costs, the defendant was further adjudged and required to pay the same by manual labor, under the control of the street commissioner, in streets, or other public works of the city of Delphi, at a rate of _____ cents per day, and commanding said jailer to receive the relator into his custody, and to obey the judgment so recited in reference to the relator. That in obedience to the command of said writ the jailer of Carroll county, Indiana, did take the relator into his custody, and imprisoned him in the common jail of Carroll county, Indiana, where the relator was imprisoned and detained for the period of one day, greatly to relator's damage," etc.

The third paragraph contains the additional allegations that, after the mayor had refused to swear appellant to the affidavit for a change of venue, and while "said cause was yet pending, before the trial thereof was begun, and before judgment or finding therein had been made or pronounced, the relator procured the services of a notary public of Carroll county, Indiana, and then and there, in the presence and hearing of the defendant, Andrew W. Wolever, was by said notary public, sworn to the truth of the matters set forth in said affidavit, and said notary public then and there, in the presence and view of the defendant, Andrew Wolever, attached to said affidavit his notarial seal," etc., and alleged that appellant then renewed his motion for a change of venue, tendering said affidavit in support of the motion, but that the

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mayor refused to receive or examine it, or to grant the change.

The fourth paragraph contains no material averment in addition to such as are contained in one or more of the other paragraphs.

The powers and duties of mayors of incorporated cities are defined by section 3062, R. S. 1881. Among other powers conferred upon him he is given, within the limits of the city, the jurisdiction and powers of a justice of the peace in all matters, civil and criminal, arising under the laws of this State. In crimes and misdemeanors his jurisdiction is co-extensive with the county in which such city is situated, and his jurisdiction is enlarged over that of a justice of the peace, so that he may adjudge imprisonment as a part of his sentence, not exceeding thirty days in the city or county prison.

The jurisdiction of justices of the peace in criminal cases is defined by section 1637, R. S. 1881. They are given concurrent jurisdiction with the circuit and criminal courts to try and determine all cases of misdemeanors punishable by fine only, and may assess fines to the amount of twenty-five dollars.

Selling or giving intoxicating liquor to a minor is made a misdemeanor by section 2094, R. S. 1881, and is punishable by fine only.

Appellant was arrested on a warrant issued by the mayor upon a charge of selling intoxicating liquor to a minor. The prosecution against him was, therefore, one of which as mayor he had jurisdiction. Appellant being brought into court and arraigned entered a plea of not guilty. The court then had jurisdiction both of the subject-matter and of the person of appellant. Indeed, up to this point the jurisdiction of the mayor is not questioned. The question is, how far, if at all, are the mayor and his sureties liable by reason of what transpired thereafter?

The position of appellant, as we understand it, is that he was entitled to the change of venue for which he asked, that

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when the application for the change was made its effect was to oust the jurisdiction of the mayor, and that all his subsequent acts were *coram non judice* and void.

There is nothing novel in the principle here involved, as questions concerning the liability of judicial officers, for their acts as such, have engaged the attention of the courts from an early day. The only difficulty is in the application of that principle to the facts in any given case. As pertinent to the question we quote the language of FOLGER, J., in the case of *Lange v. Benedict*, 73 N. Y. 12 (18 Albany Law Journal, p. 11): "There are not many topics in the law which have received more discussion and consideration than that of the liability of a person holding a judicial, or *quasi* judicial, office, to an action at law, for an act done by him while, at the same time, exercising his office. The principles which should govern such action are, therefore, well settled. The difficulty in satisfactorily disposing of a particular case is, not in finding the rule of law upon which it is to be decided, but in determining on which side of that rule the facts of the case do lie. The general rule, which applies to all such cases, and which is to be observed in this, has been in olden times stated thus: 'Such as are by law made judges of another, shall not be criminally accused, or made liable to an action for what they do as judges ;' to which the Year Books (43 Edw. III. 9 ; 9 Edw. IV. 3) are cited in *Floyd v. Baker* (12 Coke, 26). The converse statement of it is also ancient; where there is no jurisdiction at all there is no judge; the proceeding is as nothing. *Perkin v. Proctor*, 2 Wilson, 382-4, citing the *Marshalsea Case* (10 Coke, 65-76), which says: 'Where he has no jurisdiction, *non est judex*.' It has been stated thus, also: 'No action will lie against a judge acting in a judicial capacity, for any errors which he may commit, in a matter within his jurisdiction.' *Gwynne v. Pool*, Lutw. 290. It has been, in modern days, carried somewhat further, in the terms of the statement: Judges of superior or general jurisdiction are not liable to civil actions

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for their judicial acts, even when such acts are in excess of their jurisdiction, and are alleged to have been done maliciously and corruptly. *Bradley v. Fisher*, 13 Wall. 351."

The case of *Yates v. Lansing*, 5 Johns. 282, is to the same effect. KENT, Ch. J., in announcing the opinion of the court, citing and discussing many cases, says: "These cases, and many more opinions of the like effect, which could be gleaned from the Year Books, conclusively show that judges of all courts of record, from the highest to the lowest, and even jurors, who are judges of fact, were always exempted from prosecution, by action or indictment, for what they did in their judicial character."

The principle has also been recognized and applied in this State.

In the case of *Kress v. State, ex rel.*, 65 Ind. 106, it is said that a judicial officer, acting in the exercise of judicial functions, is not to be held liable to a party injured, however erroneous, false or fraudulent his judgment might be. See, also, *Elmore v. Overton*, 104 Ind. 548, where the court says: "It is well settled, and hence conceded, that a judicial officer is not civilly liable for an erroneous decision, however gross the error may have been, or however bad the motive was which inspired it. Such a liability would be inconsistent with the proper exercise of judicial functions." See, also, *Larr v. State, ex rel.*, 45 Ind. 364; *State, ex rel., v. Jackson*, 68 Ind. 58; *Halloran v. McCullough*, 68 Ind. 179; *State v. Ross*, 4 Ind. 541.

A very interesting and instructive discussion of the immunity of judicial officers from private suits will be found in the 14th chapter of Cooley on Torts. See, also, the cases there cited, and, also, the article on "False Imprisonment," 7 Am. & Eng. Encyc. of Law, pp. 661, *et seq.*

While it may at first blush seem unjust to assert a rule so broad as to cover cases of alleged fraud, corruption or oppression, and may seem to give color to the suggestion that the rule was created by the courts as a refuge to protect them-

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selves from the full measure of responsibility meted out to men generally, reflection will show that it is not only based upon almost innumerable precedents, running back to time immemorial, but that it is founded upon broad principles of right and the soundest public policy.

No man is fitted to act as judge if he has not the courage to act in accordance with conscientious convictions of right, and without fear of consequences to himself; learning, conscience and courage are all essential qualities for those whose duty it is to decide upon the rights of their fellows.

The student of English and American history will recall many instances where the judiciary has stood as the only barrier to protect society against oppression of rulers on one hand, or from the effects of hasty and ill-advised action, growing out of some wave of popular feeling or some flame of excited passion. It is absolutely essential, not only to the well-being of society, but to the preservation of our government in its integrity, that the independence of the judiciary be preserved.

By this is not meant that they should not be held responsible for official misconduct.

Our laws wisely provide for their punishment criminally for official malfeasance, and the Constitution makes provision for their impeachment and removal in a proper case. This, however, is a recognition of their responsibility to the public, to the State, and not to the individual.

The cases are few where the disappointed litigant does not feel that injustice has been done him. And, as has been well said by a learned author: "If civil actions could be maintained in such cases against the judge, because the losing party should see fit to allege in his complaint that the acts of the judge were done with partiality, or maliciously, or corruptly, the protection essential to judicial independence would be entirely swept away. Few persons, sufficiently irritated to institute an action against a judge for his judicial acts, would hesitate to ascribe any character to the acts which

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would be essential to the maintenance of the action. * * * The civil responsibility of the judge would often be an incentive to dishonest instead of honest judgments, and would invite him to consult public opinion and public prejudices, when he ought to be wholly above and uninfluenced by them. As every suit against him would be to some extent an appeal to popular feeling, a judge, caring specially for his own protection, rather than for the cause of justice, could not well resist a leaning adverse to the parties against whom the popular passion or prejudice for the time being was running, and he would thus become a persecutor in the cases when he ought to be a protector, and might count with confidence on escaping responsibility in the very cases in which he ought to be punished. * * * Whenever, therefore, the State confers judicial powers upon an individual, it confers them with full immunity from private suits. In effect, the State says to the officer that these duties are confided to his judgment ; that he is to exercise his judgment fully, freely, and without favor, and he may exercise it without fear ; that the duties concern individuals, but they concern more especially the welfare of the State, and the peace and happiness of society ; that if he shall fail in the faithful discharge of them he shall be called to account as a criminal ; but that in order that he may not be annoyed, disturbed, and impeded in the performance of these high functions, a dissatisfied individual shall not be suffered to call in question his official action in a suit for damages. This is what the State, speaking by the mouth of the common law, says to the judicial officer." Cooley on Torts, *supra*.

It is said, however, that while this may be the rule with respect to courts of general jurisdiction, it is not the rule as applied to courts of special, or limited, jurisdiction. A clear distinction does exist in the application of the rule of judicial immunity to the two classes of courts, and the mayor's court being a court of special and limited jurisdiction it is necessary to note the limits of that distinction. We will say,

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however, in passing to the consideration of this question, that while we recognize a distinction in the application of the rule to the two classes of courts, we recognize no such distinction in the rule itself. On the contrary, where jurisdiction exists in the inferior court, the rule is the same. A distinction is also to be noted between acts which are judicial in their nature, and those of an administrative, or ministerial, character. The protection extends only to judicial decisions, or acts of a judicial character, and not to mere administrative acts.

The test by which the question of liability, or non-liability, is to be determined, seems to lie in the answer to this question: Was the act complained of an exercise of judicial authority, or was it non-judicial? As applied to acts which are judicial in their nature, the answer to this query depends upon the further question: Had the court jurisdiction in the given case?

Where a court of limited jurisdiction has, in a given case, jurisdiction of the subject-matter, and of the persons interested, the same immunity is accorded to the judge, or magistrate, that is in any case accorded to the judge of a court of general jurisdiction. And here we would remark, that by jurisdiction of the subject-matter is not meant simple jurisdiction of the particular case then occupying the attention of the court, but jurisdiction of the class of cases to which the particular case belongs. *Jackson v. Smith*, 120 Ind. 520 (522); *Yates v. Lansing*, *supra*. In the latter case it is said that by subject-matter is meant the abstract thing, and not the particular case.

It is said that in courts of general jurisdiction, an action never lies against the judge because he has jurisdiction of all causes. In courts of limited jurisdiction it lies only when he exceeds that jurisdiction, and, therefore, is not in the exercise of his judicial authority. *Little v. Moore*, 4 N. J. L. 74; *Clark v. Holdridge*, 58 Barb. 61; *Dyer v. Smith*, 12 Conn. 384.

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In the case of *Little v. Moore, supra*, it is said: "It may be laid down as a universal position, which admits of no exception, that for a mere error of judgment in the execution of his office, no action can be maintained against a judge of any court. With respect to special and limited jurisdictions, it is said, that if the judge shall exceed his powers, the whole proceeding is *coram non judice, and void*; and that all concerned in such void proceeding, as well the judge, as the ministerial officer, are liable in trespass; but while within his jurisdiction, adjudicating upon matters lawfully submitted to him, how erroneous soever his opinions, he is not liable. In courts of general jurisdiction, an action never lies against the judge, because he has jurisdiction of all cases; in courts of limited jurisdiction, it lies only when he exceeds that jurisdiction, and therefore is not in the exercise of his judicial authority. The principle, therefore, is the same in all courts."

The case of *Pratt v. Gardner*, 2 Cushing. 63, was an action on the case in which it was alleged in the declaration that the defendant, who was a justice of the peace, wilfully and maliciously received a false and groundless complaint against the plaintiff for a criminal trespass, and, thereupon, wilfully and maliciously issued his warrant, upon which the plaintiff was arrested and carried before the defendant for trial, and was by him wilfully and maliciously tried and convicted without being allowed an opportunity to obtain witnesses and counsel; that upon such conviction the defendant maliciously sentenced the defendant to pay a fine of two dollars and costs; and that upon his refusing to pay the same, plaintiff was committed, by the order and warrant of the defendant, to the common jail, where he remained imprisoned for one day, until, to obtain his discharge therefrom, he was obliged to and did comply with the defendant's order to pay the fine and costs imposed upon him by the sentence. The court held that the action could not be maintained. Referring to the case of *Yates v. Lansing, supra*, and other cases

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of similar tenor, and of the rule there laid down the court says: "These rules extend as well to a justice of the peace as to any other judicial officer, acting within his jurisdiction, in a judicial capacity."

Even in courts of general jurisdiction there may be a case where the judge would be liable to an action. In the case of *Bradley v. Fisher, supra*, a distinction is drawn between a case where the court has *exceeded* its jurisdiction and where it has acted *without jurisdiction*. The court says: "A distinction must be here observed between excess of jurisdiction and the clear absence of all jurisdiction over the subject-matter. When there is clearly no jurisdiction over the subject-matter, any authority exercised is a usurped authority, and for the exercise of such authority, when the want of jurisdiction is known to the judge, no excuse is permissible." In such case the judge of the court of general jurisdiction occupies precisely the same position as the judge of limited jurisdiction who has exceeded his jurisdiction. Having no jurisdiction he is no judge, and this suggestion will aid us in determining when a judge of an inferior court can be said to have so *exceeded* his jurisdiction as to render him liable.

In our opinion there is such excess of jurisdiction only where the entire action of the court has been extra-jurisdictional, when he has assumed a jurisdiction which has never existed, and that there is no such excess of jurisdiction in a case where the magistrate, having jurisdiction, erroneously refuses to grant a change of venue to which the party asking it is entitled, and thereafter, assuming to retain jurisdiction of the cause, tries, condemns and punishes the party.

The position of appellant's counsel in this case is that appellant had taken all the necessary steps to entitle him to a change of venue, that such acts ousted the jurisdiction of the court, and that all the subsequent steps taken were *coram non judice*, and void, and were, within the meaning of the rule, in excess of the jurisdiction of the court, and that he

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is therefore liable, because when he tried and condemned appellant he had no jurisdiction. In this we think they are in error.

It must be conceded that if the necessary steps were all taken to entitle appellant to the change of venue, the action of the mayor in thereafter, over his objection, assuming to retain jurisdiction, and the resulting trial and condemnation, were *coram non judice*, and void. *Shoemaker v. Smith*, 74 Ind. 71; *Goldsby v. State*, 18 Ind. 147; *Manly v. State*, 52 Ind. 215; *Duggins v. State*, 66 Ind. 350; *Krutz v. Howard*, 70 Ind. 174; *State v. Shaw*, 43 Ohio St. 324; *Center Tp. v. Board, etc.*, 110 Ind. 579; *Krutz v. Griffith*, 68 Ind. 444; *Burkett v. Holman*, 104 Ind. 6.

Yet this would not necessarily render the mayor liable to an action. True, in that case he has *exceeded* his jurisdiction, but not, we think, in the sense in which that word is used in the cases. At least not in the sense in which the use of the word is justified by principle.

We are inclined to think the use of the words "excess" and "exceeded," in that connection, unfortunate, as not expressing with accuracy the idea intended to be conveyed. A judge, even of a court of inferior and limited jurisdiction, only *exceeds* his jurisdiction, so that he is liable to an action, when he acts *without* jurisdiction—when he *assumes* a jurisdiction with which the law has never clothed him; or when, having had jurisdiction, he has lost it in some way, as by a discontinuance of the cause, and afterwards, without notice, assuming to act, as in the case of *Dyer v. Smith*, 12 Conn. 384; or when, having jurisdiction, he should grant a change of venue, and thereafter assume to act without consent of the parties. Having jurisdiction, he does not lose it by the mere fact that an application for a change of venue is made. The application for a change of venue in itself calls for judicial action. Ruling on such a motion is a judicial act. Having jurisdiction of the subject-matter and of the person of the defendant when the application is made, his decision

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thereon is privileged to the same extent as would be the decision of a court of general jurisdiction on such a motion.

This means, of course, that whether he decides it right or wrong, he is protected without reference to the motive that may impel him to the decision. If he decides the motion wrong, and is protected therein, it will not do to say that the immunity ends with the decision of that single question, but it extends to such additional rulings and such additional action as necessarily or legitimately might follow if the decision was correct.

The conclusion we have reached renders it unnecessary to decide several other questions which are presented by the record and argued by counsel. We will, however, refer to some of them for the reason that they make more clear the correctness of our conclusion.

The affidavit first presented to the mayor was not sworn to, and appellant demanded that the mayor administer the oath. This the mayor declined to do, and counsel for the appellees seriously insist and argue that it was not his duty to do so. Without deciding this question, it is enough to say that the decision of such question by the mayor was necessary, and was clearly a judicial act. After the refusal by the mayor to administer the oath the appellant was sworn to the truth of the affidavit by a notary public, and renewed his motion. Applications for a change of venue from a mayor are governed by the law governing change of venue from justices of the peace. The statute relating to such change says "Changes of venue shall be granted whenever affidavit shall be made before the justice by either party," etc. Elliott's Supp., section 297.

Appellees insist that this requires that such affidavit must be made before the justice or mayor, and that an affidavit made before a notary public can not be recognized.

Like the preceding question, this again compelled a decision by the mayor, which was essentially judicial.

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Again, the prosecution was in the name of the State of Indiana *v.* James Aikens. Appellant responded to this name and entered a plea of not guilty. The statute, section 1742, R. S. 1881, prescribes that "If a defendant be accused by a wrong name, unless he declare his true name before pleading, he shall be proceeded against by the name in the indictment or information."

Without declaring his true name in any other way, appellant presented the affidavit hereinbefore set out. Appellees insist that the court could not recognize an application for a change of venue by "*Mike Egan*" in a prosecution against "*James Aikens*," and this question the mayor was compelled to decide, and such decision was judicial in its nature.

While not necessary to the decision of this case, it is right to say that in the opinion of this court the cases of *Dietrichs v. Schaw*, 43 Ind. 175; *Barkeloo v. Randall*, 4 Blackf. 476, and *Krutz v. Howard*, *supra*, in so far as they relate to questions herein considered, rest on questionable ground.

The court below did not err in sustaining a demurrer to the complaint.

Judgment affirmed with costs.

Filed Feb. 19, 1891.

No. 14,732.

KEMPSTALL *v.* EAST ET AL.

PLEADING.—Action on Bond.—Breach of Warranty.—Cross-Complaint—In an action on the bond of an insurance agent, a cross-complaint, based on a breach of contract, which alleges that the company sold to the agent renewals warranted to be worth a certain sum; that they were afterwards ascertained to be worth a much less sum, whereupon the contract was cancelled and the notes given in consideration for the renewals surrendered, does not state a cause of action, as the complainant is not shown to have been injured by the breach of the warranty.

SAME.—Answer.—Release of Bond.—An answer by the sureties on such

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bond alleging that the obligee agreed to cancel the bond on the compliance by the principal with certain stipulations, without alleging a compliance or an offer of compliance, is bad.

From the Lawrence Circuit Court.

J. H. Louden and W. P. Rogers, for appellant.

R. W. Miers and H. C. Duncan, for appellees.

OLDS, C. J.—This action was brought by the appellant against the appellees to recover on a bond executed by the appellee John R. East, as principal, and the other appellees as sureties. The action was commenced in the Monroe Circuit Court, and a change of venue taken and the cause transferred to the Lawrence Circuit Court.

There was a trial resulting in a verdict and judgment in favor of the appellant against the appellee John R. East for \$32, and in favor of the other appellees.

Appellant made a motion for a new trial, which was overruled and exceptions taken, and the ruling is assigned as error. There are other errors assigned.

On the 5th day of February, 1887, the appellant appointed the appellee John R. East general agent of the *Aetna* Life Insurance Company for the southern part of Indiana, and said appellant and East entered into a written contract in regard to the business, and as a security for the performance of his duties as such agent, under said contract, appellee East executed the bond in suit for \$5,000, with the other appellees as sureties. This suit is brought upon the bond, alleging a failure on the part of appellees to pay over money collected.

The first error assigned and discussed is the ruling of the court in overruling appellant's demurrer to the first paragraph of the cross-complaint of the appellee John R. East. In this paragraph of cross-complaint, it is averred by said East that on the 15th day of July, 1886, the appellant employed the appellees John R. East and William H. East as a

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firm by the name and style of East & East, as general agents of the *Æ*tna Life Insurance Company for the southern part of the State of Indiana, and on said day sold to said firm the renewals of said office, amounting, as then represented, to the sum of \$23,000, for and in consideration of the sum of \$2,000, and took the notes of said firm for said sum, payable in one year from the date thereof; that said firm of East & East took charge of said agency under said contract, with the further agreement that said East & East were to retain of the commissions, on renewals, five per cent. thereon, and send the plaintiff two per cent. of the same, the company allowing an entire commission of seven per cent. on said renewals; that on the 5th day of February, 1887, it was ascertained that said renewals did not amount to said sum for which they were sold, but that they amounted to the sum of \$14,000 only, whereupon the said plaintiff and said firm agreed that the said notes should be surrendered, the contract cancelled and that the said William H. East should retire from said firm and the business should be continued by the appellee John R. East, who, by further agreement of all the parties, was to assume the liabilities of the said firm of East & East, and be entitled to all claims which said William H. might have against said plaintiff. There is a further averment, as follows: "That at the time of the sale of said renewals to the said firm of East & East, the said plaintiff agreed and warranted said renewals to amount to sum of \$23,000, and that relying upon said warranty said firm purchased said renewals and not otherwise; that by reason of the premises the plaintiff sustained damages in the sum of \$1,000. Wherefore defendant demands judgment for the sum of \$1,000 against the plaintiff, and all proper relief."

The paragraph is bad. It alleges a sale of the renewals by which East & East were to retain five per cent. commission on the renewals, and were appointed the general agents of the company, for which said East & East executed their

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notes, payable in one year, for \$2,000, and that appellant warranted the renewals to amount to \$23,000; that it was ascertained that the renewals only amounted to \$14,000, and they rescinded the contract, and appellant surrendered the notes for \$2,000, and a new contract was entered into, by which appellee John R. East became the sole agent.

The only averments which can be construed to allege a breach of any contract relate to a breach of the warranty as to the renewals amounting to \$23,000. Subsequently another contract was made, rescinding that contract, and containing an agreement to surrender the notes for \$2,000, which is the only consideration given for the renewals.

This paragraph of cross-complaint does not state any cause of action.

The sureties filed a separate answer to the complaint. The appellant filed a demurrer to the second paragraph of said answer, which was overruled, and the ruling is assigned as error.

By this paragraph the sureties admit the execution of the bond by John R. East as principal and the other appellees as sureties, and aver that on the 25th day of October, 1887, said John R. East and the appellant terminated the contract for which said bond was given; that the bond sued on in this action was executed on the 7th day of March, 1887, to secure the contract sued on in this action; that said contract continued in force until October 25th, 1887, when the appellant and said John R. East had a full settlement of the business of said agency mentioned in the complaint, and it was then and there agreed between them, without the knowledge or consent of these defendants, the sureties, or any of them, that said East would release all his interest in the renewals of the said agency, and turn over to said appellant as security a certain note and mortgage on lot 342 in the city of Bloomington, Indiana; also release the said appellant from further liability on the contract herein, and that said East should continue to act as such agent for said appellant at a salary

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of \$100 per month, and the said East to execute a new bond for the performance of the new contract ; that at the time of said settlement, in consideration of the foregoing facts, the said appellant then and there agreed to release all of these defendants from further liability on the bond sued on in this action, and agreed to surrender and cancel said bond on the 25th day of December, 1887, and did turn over to him said note and mortgage ; that, in pursuance of said contract, the said John R. East did work for said plaintiff until the 15th day of December, 1887 ; that at the time of said settlement the said East was charged with a balance of \$1,371.70 ; that there was due the said East of uncollected commissions on new business the sum of \$700, as well as could then be ascertained, which was to be credited on said sum charged against him ; that the note and mortgage amounted to the sum of \$800, all of which was accepted and done in full discharge of the bond in suit.

The consideration pleaded for the release of the bond in this paragraph consists of four elements, as follows: 1st. East was to release all his interest in the renewals of the said agency. 2d. East was to turn over to the appellant as security a certain note and mortgage on lot 342 in the city of Bloomington, Indiana. 3d. East was to release the said appellant from further liability on the contract sued on ; and, 4th. East was to continue to act as agent at \$100 per month.

To make a good answer it was necessary to aver a compliance with these stipulations of the contract, *i. e.*, it was necessary to aver that East released all his interest in the renewals of said agency ; that he turned over to the appellant the note and mortgage on said lot 342 ; that he released the appellant from all further liability on the contract sued on, and that he continued to work for the plaintiff at \$100 per month, or that he offered and was ready and willing to do these things.

It is impossible to tell from the language of the answer as copied into the record what it was intended to aver. It does

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not aver with any certainty that East did any of these things except that he acted as agent, at \$100 per month for a time. The answer is uncertain, defective, and bad; the demurrer should have been sustained to it.

Objection is made to the third paragraph of the separate answer of appellee John R. East.

This paragraph pleads a good set-off, and there was no error in overruling the demurrer to it, nor do we think there was any error in overruling the demurrer to the fifth paragraph of answer.

There are numerous other questions presented which arise on the motion for a new trial, but they may not arise on a re-trial of the cause.

For the error in overruling the demurrer to the first paragraph of cross-complaint, and the demurrer to the second paragraph of the answer of the sureties the judgment must be reversed.

Judgment reversed, at costs of the appellees, with instructions to proceed in accordance with this opinion.

Filed Feb. 25, 1891.

127	325
167	451

No 14,748.

Cox v. HAUN.

REAL ESTATE AGENT.—*Exchange.—Commission from Both Principals.*—

Where a real estate broker, with property in his hands for sale, brings together the owner thereof and another owner who employs him to make an exchange, he is entitled to compensation from the latter, if he acts in good faith, and the parties make their own bargain uninfluenced by his representations.

From the Boone Circuit Court.

S. M. Ralston and M. Keefe, for appellant.

T. W. Lockhart, for appellee.

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ELLIOTT, J.—This case has been twice tried, and the result in each instance has been against the appellant. He asks a reversal upon the ground that the trial court erred in denying him a new trial.

The point is made that the verdict is not sustained by the evidence, and, in support of this point, it is urged that the evidence fails to establish a fact essential to a recovery. The fact which it is said is not proved is that the appellant did not have knowledge that the appellee was acting for the parties in making an exchange of real estate. To understand the question it is necessary to outline the facts. The appellee was a real estate broker, and had in his hands for sale a farm belonging to Avery Fish. The appellant asked the appellee if he had a farm which he could exchange for property in the city of Lebanon, and this opened the negotiations which led to the exchange of property. After several interviews the two owners were brought together, and an exchange effected, the owners fixing the terms of the exchange. The meeting took place in the appellee's office, and the terms of the exchange were there agreed upon by the owners themselves without any suggestions as to terms from the broker. The appellee, in his testimony, says that the owners "knew that he was acting as agent for them both," and he also testifies that the appellant agreed to pay him a commission of one and a half per cent. This evidence fully sustains the verdict. It is probable that without any direct testimony showing that the appellant knew that the broker was acting for the other party to the exchange the fact that he was so acting would be necessarily inferable from the fact that the appellant knew the business in which the appellee was engaged, and knew that he already had in his hands, as broker, the property of the other party to the contract of exchange.

If an owner goes to a broker and promises to pay him a commission for effecting an exchange with another owner who has already employed the broker, it is no more than reasonable to infer that he does so with knowledge that if the

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broker rendered service to both parties he will expect compensation from both of them.

It is a mistake to suppose that an ordinary real estate broker occupies the same position as an agent employed to buy or sell specific property, for such a broker is generally a middleman, employed to bring the principals together, and give them an opportunity to effect an exchange of property. *Pape v. Wright*, 116 Ind. 502; *Vinton v. Baldwin*, 88 Ind. 104; *Alexander v. North Western Christian University*, 57 Ind. 466; *Rowe v. Stevens*, 53 N. Y. 621; *Rupp v. Sampson*, 16 Gray, 398; *Barry v. Schmidt*, 27 Alb. L. J. 297; *Stewart v. Mather*, 32 Wis. 344; *Herman v. Martineau*, 1 Wis. 136. If the broker is guilty of fraud, or if he takes any advantage of his position to the injury of his principal, he can not recover commissions; but where, as here, he acts in good faith, brings the principals together in his own office, and they make their own bargain, uninfluenced by any representations of his, he is entitled to compensation.

The trial court did not err in treating the showing for a new trial, upon the ground of newly-discovered evidence, as insufficient.

Judgment affirmed.

Filed Feb. 19, 1891.

No. 14,767.GILLETT *v.* SULLIVAN.

JUDGMENT.—Enforcement Enjoined.—Insolvency of Plaintiff.—Lien on Defendant's Land Owed by Plaintiff.—An insolvent judgment creditor, seeking to enforce his judgment generally, who has conveyed to the judgment debtor, by warranty deed, a tract of land upon which there is a valid mortgage owed by such creditor, will be enjoined until such mortgage is satisfied, regardless of the fact that such creditor has especially agreed to pay it.

From the Madison Circuit Court.

Gillett *v.* Sullivan.

H. D. Thompson, for appellant.

W. A. Kittinger and *L. M. Schwinn*, for appellee.

OLDS, C. J.—This is a suit by the appellant against the appellee upon a promissory note executed by the appellee in her maiden name of Emma Chaplin.

The appellee filed a cross-complaint, consisting of two paragraphs, to which the appellant first addressed a motion to strike out, and then a demurrer to each paragraph. The motion and demurrer were overruled, and exceptions reserved. These rulings are assigned as error, and question the sufficiency of the paragraphs of cross-complaint.

The paragraphs are not materially different. It is alleged in each paragraph that John C. Chaplin, Jr., and Caroline T. Gillett each owned an undivided interest in certain real estate, which interest they had inherited from their father, John Chaplin, Sr., deceased; that said John Chaplin, Jr., and Caroline T. Gillett and her husband mortgaged said real estate to Braxton Baker to secure a note for \$326 and interest and attorney's fees, which note was signed by said mortgagors; that appellee first purchased of said John Chaplin, Jr., his interest in said real estate for \$600, which sum he has paid, and afterwards purchased the interest of the appellant in said real estate for \$600, and executed to her two notes for part of the purchase-money, one of which is the note in suit for \$250, and the other appellee has paid; that as a part of the consideration of said notes executed by the appellee to appellant, appellant agreed to pay off and cancel the mortgage on said real estate given to Baker; that appellant conveyed said real estate to appellee by deed of general warranty; that the note to Baker has not been paid, and that he brought suit on said note and for the foreclosure of the mortgage securing the same, making all the parties hereto parties to such foreclosure suit, and obtained judgment on his note against the makers, and foreclosure of the mortgage against all of said parties; that the appellee

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lant appealed from said judgment to the Supreme Court, but that said judgment was still in full force, unreversed and unsatisfied. That the said appellant and her husband, and John Chaplin, Jr., are each and all insolvent, so that a suit upon their warranty would be unavailing in case the appellee is compelled to pay said mortgage debt.

Prayer that appellant be restrained from prosecuting this suit or from collecting said note until the note and mortgage in favor of Baker are fully paid and satisfied.

There was a special finding of facts made by the court and conclusions of law stated, and a judgment rendered in favor of the appellant against the appellee, and a further order and judgment that said judgment shall not be collected by execution until the note and mortgage in favor of Baker, on which judgment had been rendered, were fully paid and satisfied; in other words, staying proceedings on the judgment until the Baker note and mortgage were paid, and the land released.

The paragraphs of cross-complaint were sufficient to entitle the appellee to have proceedings upon the judgment stayed until the note and mortgage to Baker had been paid and cancelled, whereby the real estate is released. This is true independent of the contract alleged in the cross-complaint that the appellant contracted to pay the Baker mortgage as a part of the consideration of the note.

It is alleged in each paragraph that the land conveyed by the appellant to the appellee, for which the note in suit was given, was encumbered by a mortgage executed by the appellant; that appellant executed to appellee a warranty deed for the land, and that appellant and the other grantors of the land were totally insolvent; that the note secured by mortgage was past due and judgment had been rendered upon it. The appellant was one of the makers of the note to Baker, and one of the mortgagors in the mortgage securing the note. She was liable individually for the whole note, and the land conveyed by her was liable for the whole debt.

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to Baker. While the appellee might have paid off the note and held it as a set-off against the note given the appellant, yet she was not compelled to do so. The appellee was entitled in equity to have the collection of the note against her suspended until the appellant removed the encumbrances from the land conveyed. The appellant in good conscience ought not to ask the payment of the note to her while there was an outstanding lien against the land conveyed which appellee would be compelled to pay, and which she could not collect by reason of the insolvency of the appellant and the other warrantors. If the appellee is compelled to pay the note in suit and afterwards to pay the mortgage debt to Baker, she would be without remedy by reason of the insolvency of her grantors.

In *High on Injunctions*, in speaking of enjoining against actions at law, it is said (section 45): "The injunction is directed, not to the court, but to the litigant parties, and in no manner denies the jurisdiction of the legal tribunal. It merely seeks to control the person to whom it is addressed, and to prevent him from using the process of courts of law where it would be against conscience to allow him to proceed. It is granted on the ground that an unfair use is being made of the legal forum, which, from circumstances of which equity alone can take cognizance, should be restrained lest an injury be committed wholly remediless at law." See, also, section 243.

Such is the state of facts existing in this case, as shown by the allegations of the cross-complaint. If the appellant is permitted to prosecute this suit to final judgment and execution, and collect the note in suit from the appellee, the appellee being in a position where she would be compelled to pay the mortgage debt to Baker or lose the land purchased, her remedy by suit upon the warranty would be worthless by reason of the insolvency of the grantors. To permit the appellant to enforce the collection of her judgment in this case by execution would be permitting the appellant to make

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an unfair use of the legal forum, and leave the appellee reme-
diess. There are some decisions of this court in harmony
with this theory. See *Ricker v. Pratt*, 48 Ind. 73; *Arnold*
v. Curl, 18 Ind. 339; *Fehrle v. Turner*, 77 Ind. 530.

This question was not clearly presented in the case of
Chaplin v. Baker, 124 Ind. 385.

There was no error in overruling the motion to strike out
the cross-complaint or in overruling the demurrer to each
paragraph thereof.

Nor is there any available error in the conclusions of law
stated by the court. The facts found are substantially as
alleged in the cross-complaint. They are not as fully stated
as they should be, but a proper judgment was rendered.
Judgment was rendered in favor of the appellant, but a
further order and judgment was entered staying the execu-
tion for the collection thereof until the payment of the mort-
gage debt to Bohn and the satisfaction of the mortgage se-
curing the same, which was a lien upon the land prior to the
conveyance of the same by the appellant to the appellee.
This was the relief which the appellee was entitled to under
the facts found. Nor was there any error in overruling ap-
pellant's motion for judgment on the special finding.

There was no error in overruling the motion for a new
trial. There was evidence to establish all of the material
facts found by the court. The mortgage was a lien upon the
land sold and conveyed by the appellant to the appellee by
warranty deed. The land so conveyed was liable for the
payment of the whole debt, and the evidence tended to prove
that the appellant was liable, and had, for a valuable con-
sideration, agreed to pay the whole debt; that she and her
brother, John Chaplin, had executed the note jointly and the
mortgage securing the same, and that for a valuable consid-
eration received from her brother she had agreed to pay the
whole debt, and thus agreed with the appellee as a part of
the consideration for the note sued upon to pay it and have
the mortgage released. But the evidence tends to prove that

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the note was given for the balance of purchase-money for land conveyed by the appellant by warranty deed to the appellee, upon which there was, at the time of the conveyance, a mortgage executed, which was a lien upon the land so conveyed; that the note was unpaid and had been sued upon; that the mortgage was executed by the appellant and her husband and brother, all of whom are insolvent, and the note secured by the mortgage had been sued upon and judgment rendered against the appellant, and a decree of foreclosure of the mortgage entered against all of the parties.

This put the appellee in a position where she would be compelled to pay the mortgage or lose the land, and if appellant is permitted to enforce payment of the judgment in this cause, appellee will be remediless, as the grantors in her deed are insolvent. Under these circumstances, which are supported by the evidence and found by the court, the appellee was entitled to the relief granted and judgment rendered.

There is no error in the record.

Judgment affirmed, with costs.

Filed Feb. 27, 1891.

127 332
144 500
127 332
150 110

No. 15,913.

WINDELL v. TROTTER, ADMINISTRATOR.

DESCENT.—Interest of Childless Second Wife.—Reversionary Interests of Heirs.—Rights of Creditors.—The act of March 11th, 1889, provides that where a man marries a second wife, and has by her no children, and dies, leaving children by his first wife, the interest of such second childless wife in the lands of the decedent shall be only a life estate, and the fee of the same shall, at the death of such husband, vest in such children, subject only to the life-estate of the widow.

Held, that the portion of the land in which the widow takes a life-estate is free from the demands of creditors, and is not subject to be made assets by sale for the payment of debts.

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Held, also, that where all the lands of the decedent are, with the consent of the widow, sold to make assets, she is entitled to the value of her life-estate out of the proceeds of the portion subject to the life-estate, and that the children are entitled to the remainder of the proceeds of such portion.

From the Harrison Circuit Court.

W. N. Tracewell and *R. J. Tracewell*, for appellant.

G. W. Self, for appellees.

COFFEY, J.—The appellee, Leslie C. Trotter, as administrator of the estate of James Woodward, deceased, filed a petition in the Harrison Circuit Court to sell the lands of the decedent to make assets with which to pay debts. He made parties defendant to said petition Martha Woodward, the widow of the deceased, and the appellant, and James Woodward, Jr., his children by a former wife. Martha Woodward was a second wife, by whom the deceased had no children. The said Martha filed her written consent to the sale of all the land, electing to take her interest in the proceeds of the sale. The administrator sold the land for the sum of \$14,438, and upon the filing of the report of sale the said Martha filed her intervening petition, praying that the present value of her life-estate in one-fourth of said amount, be ascertained and paid over to her, which was done. Of the one-fourth of said sum, after paying the widow the value of her life-estate, there remained the sum of \$1,193.82. The appellant filed a petition setting forth that she and the said James Woodward, Jr., were the only heirs at law of James Woodward, deceased, who was their father, and praying that one-half of this sum be paid over to her free from the demands of creditors, to which petition the court sustained a demurrer, and she excepted.

The only question involved in the case relates to the correctness of this ruling.

It is contended by the appellee that immediately upon the death of James Woodward his real estate descended to his

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children by a former marriage, in fee simple, subject to a life-estate in the widow in one-fourth, and that the whole of said land was liable to be sold to make assets for the payment of debts.

On the other hand it is contended by the appellant that under the statutes of this State one-fourth of the land of which James Woodward died seized was free from the demands of creditors, and that it was not subject to be made assets for the payment of the debts due from said estate.

Under the proviso in section 2487, R. S. 1881, construed in connection with section 2483, it was held that the estate which a widow takes in the real estate of her husband is a fee simple, whether she be a first, second or subsequent wife. If, however, she had no children by the husband from whom she inherits the land, his children became, by compulsion of law, her heirs, in case they or their descendants survived her. While she lived they had no interest in the land. *Erwin v. Garner*, 108 Ind. 488; *Thorp v. Hanes*, 107 Ind. 324; *Bryan v. Uland*, 101 Ind. 477; *Gwaltney v. Gwaltney*, 119 Ind. 144.

By an act of the General Assembly which took effect March 11th, 1889 (Acts 1889, p. 430; Elliott's Supp., section 423), section 2487 was amended so that the proviso thereto reads as follows: "Provided, That if a man marry a second or subsequent wife and has by her no children, but has children alive by a former wife, the interest of such second or subsequent childless wife in the lands of the decedent shall only be a life-estate, and the fee of the same shall at the death of such husband vest in such children, subject only to the life-estate of the widow."

As James Woodward departed this life after the above statute took effect, it is conceded that his widow took only a life-estate in his land. The controversy here involves the question as to whether the fee simple to the one-fourth, in which she took a life-estate, was subject to sale by the administrator to make assets for the payment of debts.

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At common law the title to real property vested absolutely in the heir upon the death of the ancestor, and was not subject to be made assets for the payment of debts.

In the absence of some statutory provision, therefore, the land for which the fund now in controversy was sold belonged to the heirs and was free from the demands of creditors. The question then depends upon the construction to be placed upon our statutes providing for the sale of land by administrators.

Section 2333, R. S. 1881, provides that "The real estate liable to be sold for the payment of debts, when the personal estate shall be insufficient therefor, shall include:

"*First.* All the real estate held or possessed by the deceased at the time of his death by legal or equitable title (except such as was held upon a contract for the purchase of land), and all interest in real estate which would descend to his heirs.

"*Second.* All school or other lands held on a certificate of purchase of the general government or State of Indiana.

"*Third.* All lands, and any interest therein, which the deceased, in his lifetime, may have transferred, with the intent to defraud his creditors."

It is apparent upon the reading of this statute that it is broad enough to cover any vested interest a deceased may have in land at the time of his death. The exception to the sweeping provisions of this statute are found in section 2347 of the same act. That section is as follows: "If the decedent leave a widow, and the real estate owned by him at his death shall not exceed ten thousand dollars in value, the court shall direct the sale of the undivided two-thirds part thereof for the payment of said debts and liabilities; and if the value thereof exceed ten thousand dollars, and do not exceed twenty thousand dollars, the court shall order the sale of the undivided three-fourths thereof; and, if it exceed in value twenty thousand dollars, the undivided four-fifths thereof for said purpose."

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Section 2333 and this section must be construed together, and, when so construed, it seems plain to us that the power to sell the undivided one-third, one-fourth, or one-fifth, as the case may be, to make assets for the payment of debts, is not granted. Under the provisions of these statutes the administrator could not legally procure an order of the court to sell the undivided one-third or the other quantities named, without the consent of the widow. In this case, if the widow had not given her assent thereto, no order could have been entered by the court to sell a greater quantity than three-fourths of the land of which James Woodward died seized. If no order could have been made for the sale of an undivided one-fourth, it could not have been converted into assets for the payment of debts.

But, as we have seen, she gave her consent to the sale of all the land, and the question arises as to what effect, if any, such consent had upon the interest of the children and heirs of the deceased, in whom was vested the fee simple of the one-fourth.

This leads us to inquire into the purpose sought to be accomplished by the General Assembly by the amendments passed in 1889, above referred to. As it made no provision for converting the portion of the land formerly taken by the widow into assets for the payment of debts, it is fair to presume that it was intended as a provision wholly for the benefit of the heirs by a previous wife.

There are many other facts and circumstances which tend strongly to support this presumption.

As we have seen, under the statute as it existed prior to the amendment, the second or subsequent wife took a fee simple interest in the lands of her husband, and the children by a former wife had a mere expectancy. The widow was at liberty to destroy or remove the buildings, to strip the land of valuable timber and to commit all manner of waste, while the heir in expectancy had no means to prevent it. He could not maintain a suit to enjoin such waste, and it

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often occurred, we may presume, that when the land came to the children by a former marriage it was of little value. *Gwaltney v. Gwaltney, supra.*

By the amendment of 1889, which vests the fee simple to that portion taken by the widow in the children by a former marriage, it was doubtless the intention of the Legislature to place such children in a situation to protect the land from waste, and thus preserve its value.

It was a provision wholly for the benefit of the children, without any intention to enlarge the rights of the creditors or administrator of the estate.

We are of the opinion that the widow, who owned a life-estate only, could not affect the interest of the children, who owned the fee, by giving her consent to a sale of the whole of the land. It is true that the heirs can not be heard to say that the land was not properly sold, because they were parties to the petition to sell and are bound by the proceedings, but it does not appear that any adjudication was had as to the fund now in dispute which would estop them from asserting any claim they may have thereto. The money paid to the widow was all she was entitled to receive. It represents the value of her life estate in one-fourth of the land sold by the administrator. What remains of the fund derived from the sale of one-fourth of the land represents the value of the fee simple which was vested in the children by a former marriage.

Upon this latter fund the widow has no claim. As this one-fourth was not subject to sale by the administrator to make assets with which to pay debts, we are of the opinion that the administrator has no claim upon it. It belongs to the children of the deceased by a former marriage.

This conclusion does no injustice to the creditors, for their rights remain unchanged by the amendment of 1889.

It follows, from what we have said, that the circuit court

Harrod v. Dismore, Sheriff.

erred in sustaining the demurrer to the petition of the appellant.

Judgment reversed, with directions to overrule the demurrer to the petition and for further proceedings not inconsistent with this opinion.

Filed Feb. 27, 1891.

127	838
132	258
127	838
144	659
127	838
156	90

No. 14,853.

HARROD v. DISMORE, SHERIFF.

JUDGMENT.—*Collateral Attack.*—A judgment rendered by a court of competent jurisdiction against a defendant for violating the statute prohibiting the obstruction of public ditches can not be collaterally attacked.

From the Scott Circuit Court.

C. B. Harrod, for appellant.

C. L. Jewett, for appellee.

ELLIOTT, J.—The appellant seeks by his complaint to enjoin the collection of a judgment rendered against him for violating the statute prohibiting the obstruction of public ditches.

The contention of counsel is that the statute requires that the defendant in such a prosecution shall be fined ten dollars, and that, as the fine imposed was only five dollars, the judgment is void. This contention can not prevail. The court had general jurisdiction of the subject, and its judgment, even if erroneous, can not be collaterally assailed. The error complained of would not avail in a direct attack, since the imposition of a less fine than the law requires in a case where the only punishment is a fine, is not prejudicial to the defendant. *Nichols v. State, post*, p. 406.

Judgment affirmed.

Filed March 10, 1891.

Miller et al. v. Cook.

14,783.

MILLER ET AL. v. COOK.

WITNESS.—*Impeachment of by Party Producing.*—*Surprise.*—*Discretion of Trial Court.*—A party producing a witness may show that he has made statements different from his present testimony, upon the ground of surprise. In such an instance the matter is of necessity left very much to the discretion of the trial court. Section 507, R. S. 1881.

APPEAL.—*Presumption.*—*Error.*—The presumption, on appeal, is that the lower court did not commit an error.

From the Pike Circuit Court.

J. W. Wilson, E. A. Ely, W. F. Townsend and E. Smith,
for appellants.

F. B. Posey, A. N. Taylor and E. P. Richardson, for appellee.

MILLER, J.—This was an action brought by the appellee against the appellants to set aside certain conveyances of real estate from Justus Miller, Sr., to Justus Miller, Jr., and Levisa Bell, which it was claimed had been executed in fraud of the creditors.

The appellants having answered the complaint by a general denial, the cause was submitted to the court for trial, which resulted in a finding and judgment in favor of the appellee.

A motion for a new trial, assigning as causes the insufficiency of the evidence to sustain the finding of the court, and the admission of incompetent evidence, was made and overruled.

The evidence shows, among other things, that in March, 1887, a cause of action accrued to the appellee against the appellant Justus Miller, Sr., for slanderous words spoken by him; that on the 12th day of August a criminal prosecution for libel was instituted, by affidavit, before a justice of the peace, for the speaking of these words, and on the same day Miller, Sr., was arrested, brought before the magistrate,

Miller *et al. v. Cook.*

and gave bond for his appearance on the 20th of the month ; that on the 20th the appellants, Miller, Sr., and Miller, Jr., appeared before the justice, and, after a parley about pleading guilty, made a motion to quash the indictment, pending which a change of venue was taken to another justice, and the hearing set for the 30th inst.; that on the 24th day of the month the appellants went to Petersburg, a distance of eighteen or twenty miles, and had two deeds prepared and executed by Justus Miller, Sr., and wife, one to the appellant, Justus Miller, Jr., who was his son, expressing the consideration as follows : " This deed is upon the express condition that the grantee maintains and supports the grantors their natural lives, of each and both, in a manner suitable to their age and condition, and give to each of them a decent burial at death, and erect at the grave of each of them tombstones of reasonable value, suitable to their age and condition." And one to Levisa Bell, his daughter, reciting a consideration of \$680 ; that by these two deeds he conveyed all his real estate, about 400 acres, worth \$10 per acre ; and that at the same time he transferred all his personal property, worth from \$450 to \$500, to Justus Miller, Jr.; that since that time he has been insolvent.

That on the day of the execution of the deeds the appellant Justus Miller, Jr., was informed by the father of the appellee that the criminal prosecution would be abandoned and a civil suit for damages instituted, unless a retraction of the slanderous words charged was made in writing ; that shortly afterwards Miller, Jr., moved on the land ; that no money was paid by either of the grantees, and there was no consideration for the execution of the deed to Levisa Bell, except a desire on the part of her father, as he expressed it, to " make her even with her sister." Shortly afterward a suit for slander, counting upon the same cause of action referred to in the criminal prosecution, was brought, and a verdict for \$1,600 rendered in favor of the appellee against

Miller *et al.* v. Cook.

the appellant Miller, Sr., upon which an execution was issued and returned wholly unsatisfied.

Some additional evidence was introduced by the respective parties, of declarations of the grantor, running back through a series of years, to the effect that he sometimes said he would, and sometimes that he would not, turn his property over to his children.

We conclude that the finding of the court is fully sustained by the evidence.

On the trial the appellee examined Justus Miller, Sr., as a witness, on her behalf, and during his re-examination he stated that at the time of the making of the deeds, he did not know that a civil suit was going to be brought against him, and thereupon the appellee propounded to him this question :

“ Did you not say to Hansel Spradley, in the town of Petersburg, Pike county, Indiana, in November, 1887, that the reason you did not plead guilty before Esquire Hanroth was because it would have bound you in the civil suit; that you knew that they were going to bring a civil suit? ”

Objection was made to this question, and overruled, and he answered :

“ No, I did not tell Spradley that. I had no such conversation with him.”

Standing alone, this could not harm the appellant, for nothing was proven. The same may be said with reference to the following question propounded to him :

“ Did you say to William Roe, in Lockhart township, this last week, that you would rather law away all of that property than that Ida Cook should ever get a cent of it? ”

To which he answered : “ I don’t remember saying that.”

Objection is also made to the ruling of the court in allowing Hansel Spradley, while a witness upon the stand to answer this question :

“ Did Justus Miller, Sr., say to you last fall, in the town of Petersburg, he did not plead guilty to the charge before

Miller *et al.* v. Cook.

Esquire Hanroth, because he knew a civil suit would be brought, and his admission would bind him?"

As has been stated Justus Miller, Sr., had, during his re-examination, denied that he had any knowledge that the bringing of a civil suit against him had been contemplated, when the record informs us he was asked if he had not made contradictory statements to Hansel Spradley, at a certain time and place, as above set out, which he denied.

We are not informed upon what grounds the court admitted the evidence, but from the form and position of the question it is apparent that it was intended as an impeachment. The right of a party producing a witness to show that he has made statements different from his present testimony, upon the ground of surprise (section 507, R. S. 1881), is a matter necessarily left very much to the discretion of the trial court, and as the presumptions are all in favor of the trial court, we can not say that there was any abuse of discretion in allowing the question to be answered. But if we had arrived at a contrary opinion upon the admissibility of this evidence, we could not disturb the finding and judgment of the court, for the evidence, excluding that which is objected to by the appellant, shows that the "merits of the cause have been fairly tried and determined in the court below," and we are, therefore, forbidden by statute (section 658, R. S. 1881) to reverse the judgment.

Judgment affirmed.

Filed March 10, 1891.

Davis v. Meisner.

No. 14,773.

DAVIS v. MEISNER.

PROMISSORY NOTE.—Consideration.—Execution and Payment of Bail-Bond.—

The defendant's son, on a plea of guilty to petit larceny, was fined in a certain sum and committed to jail in default of payment. The defendant and his son paid a part of the judgment, and to secure a stay of execution on the remainder executed a replevin bond. The plaintiff, at the request of the defendant, also signed the bond, and the defendant executed his note as collateral security. The son was not in jail when the bond was signed, but had been released two days before. After the expiration of the stay the plaintiff paid the judgment and instituted an action on the note.

Held, that the fact that the son had been released from jail when the plaintiff signed the bond was no defence to the action, and that execution of the bond and the payment constituted a good consideration for the note.

From the Harrison Circuit Court.

W. N. Tracewell and R. J. Tracewell, for appellant.

W. Cook and W. Ridley, for appellee.

McBRIDE, J.—The controversy in this cause grows out of the following facts:

Appellant's son was indicted in the State of Nebraska for grand larceny. On being arraigned he entered a plea of guilty of "petit larceny." The plea was accepted by the court, and he was thereupon adjudged guilty and fined in the sum of \$50 and costs. The fine and costs together amounted to \$224.76, and the son was committed to jail in default of payment. Appellant, who resides, and then resided, in this State, had gone to Nebraska to assist his son, but neither he nor the son had money enough to pay the amount of the fine and costs, and after the payment of all the money they had there remained a balance of \$174.76 unpaid. Under the laws of Nebraska this could be stayed five months by entering replevin bail. Appellant and his son together executed a replevin bond for this amount, but the clerk of the court, whose duty it was to take and approve

Davis v. Meisner.

the bond, refused to approve it unless some responsible citizen of Sheridan county, Nebraska, also signed it. The bond was executed by appellant and his son on the 27th day of May, 1887, and was in the sum of \$174.76. On the 28th day of May, 1887, appellant solicited the appellee, who was a responsible resident of Sheridan county, Nebraska, to sign said bond with him as an additional surety, and he did so on condition that appellant execute to him a note for \$174, due five months after date, as collateral security, which was done. Appellant and his son then returned to Indiana. The son was not in jail when the appellee signed the bond, but had been released two days before.

The only consideration for the note was as above stated. Neither appellant nor his son paid any thing more of said fine and costs, and after the expiration of the stay appellee paid it, and brought this suit to recover on the note.

The contention of appellant is, that as his son had been released from jail, and was not in confinement when appellee signed the bond, there was no consideration for appellee's undertaking; there was no legal obligation resting upon appellee to pay the balance of fine and costs due, and that the payment of the same by him was a mere voluntary payment, for which he can not recover. This contention rests upon the assumption that the sole consideration of the bond was to secure the release of appellant's son from jail. In this assumption the appellant is altogether wrong. Imprisonment was not adjudged as a part of the punishment, and the imprisonment of the son was merely as an aid to the collection of the fine and costs. It had been adjudged that he pay a certain sum of money, and that he stand committed until the judgment was paid or replevied. The State of Nebraska was thereafter interested only in the collection of the judgment, and the imprisonment was a mere incident. Possession of his body was retained as a means of coercing him to make provision for such payment. At any time, by payment of the money, or by entering replevin bail, he could

Davis v. Meisner.

secure his release. The imprisonment, however long continued, could not pay or satisfy the judgment. Nor would the fact of his release from prison by the jailor, without payment or bail, release the judgment. The sole motive which induced appellant and his son to execute the bond may have been to secure the son's release from jail; but the consideration upon which the State accepted the bond was that it thereby secured the ultimate payment of the money. The consideration moving to appellant and his son was not alone the release of the son from jail, but the agreement of the State to forbear the enforcement of the judgment for five months.

The validity of the judgment against the son is not questioned, nor is it questioned that by signing the bond appellee secured to the appellant's son five months' forbearance on the debt. We are unable to see wherein there was any lack or failure of consideration, or why it can be claimed that there was no legal obligation resting upon appellee to pay the balance due on the judgment.

Even if the bond was not enforceable against the appellee for any reason, it could not be rightfully said that the payment made by appellee was voluntary, and gave him no rights as against appellant.

A voluntary payment is where one pays the debt of another without previous request, and without being under any legal obligation to do so. The law treats such a payment as a gift, and will not allow one to thus thrust himself upon another as a creditor.

In this case no question exists as to the validity of the bond as against both appellant and his son. Appellant, being himself liable on the bond, requested appellee to sign it, and as an inducement to do so he executed to appellee the note in suit for the amount, making it due and payable the day the stay expired.

This was a request for appellee to pay the balance due on the judgment and costs when the stay expired, coupled with

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a promise to reimburse him by the payment of the note. If it were conceded, therefore, that the bond imposed no legal obligation upon appellee, it does not lie in appellant's mouth to say to him, "You paid my debt, but you paid it voluntarily and without compulsion, and I will treat it as a gift."

There is some controversy over the evidence, appellant insisting that the court did not allow him a credit of \$30 which he says he was entitled to under the evidence.

The evidence tends to sustain the finding, and this court will not in such case disturb the finding of the trial court.

There is no error in the record, and the judgment is affirmed, with costs, and ten per cent. damages.

Filed Feb. 27, 1891.

No. 14,867.

127 346
134 445

JACKSON v. JACKSON ET AL.

DEED.—Construction.—Life-Estate and Remainder.—Rule in Shelley's Case.—The grantor conveyed to the grantee by deed certain real estate, "for life, and after his death to the then living children of his body;" a right to a living off the real estate was reserved to the grantor, it being expressly understood that "the grantee is to have no greater interest than a life-estate, and that at his death said tract shall go to the children of his body then living."

Held, that the rule in Shelley's Case does not apply, and that the grantee took only a life-estate, and that the children, who were living at the time of the making of the deed, and at the death of the grantor, took the fee.

From the Hendricks Circuit Court.

L. M. Campbell, for appellant.

J. L. Clark and G. A. McQuown, for appellees.

OLDS, C. J.—On March 12th, 1885, one Ursula Jackson was the owner of certain real estate described in the complaint and in the deed therein set out. The ap-

Jackson v. Jackson et al.

pellant, Elihu M. Jackson, had certain children of his body then living, and on said date the said Ursula Jackson executed a deed for said lands, of which the following is a copy:

“ This indenture witnesseth, that Ursula Jackson, who has no husband, of Hendricks county, in the State of Indiana, convey and warrant to Elihu E. Jackson for life, and, after his death, to the then living children of his body, of Hendricks county, in the State of Indiana, for the sum of natural love and affection and ten dollars, the following real estate in Hendricks county, in the State of Indiana, to wit: A part of the east half of the southeast quarter of section seven (7), in township fourteen (14) north, of range one (1) west, and bounded and described as follows, to wit: Beginning thirty-one (31) rods north of the southeast corner of said east half; thence running north with section bearing sixty-eight and forty-eight hundredths (68.48) rods; thence west with section bearing eighty and eighty-four hundredths (80.84) rods, to the west line of said east half; thence south on said line, sixty-eight and forty-eight hundredths (68.48) rods; thence east, eighty and eighty-four hundredths (80.84) rods, to the place of beginning, estimated to contain thirty-four acres, more or less. And the grantor hereby reserves the right to her living off the above described real estate during her natural life. And it is expressly understood that said Elihu E. Jackson, the grantee, is to have no greater interest than a life-estate, and that at his death said tract shall go to the children of his body then living. In witness whereof, the said Ursula Jackson has hereunto set her hand and seal, this twelfth day of March, 1885.

her

“ **URSULA X JACKSON.**”
mark.

Ursula Jackson is dead, and the appellant brings this suit to quiet title, alleging the facts in the complaint, and making his children parties defendant. The appellees demurred to

Jackson v. Jackson *et al.*

the complaint. The court sustained the demurrer; exceptions were entered, and this appeal is prosecuted, and the ruling on the demurrer is assigned as error. This presents the only question in the case.

The question for decision is as to whether the children of the appellant, who were living at the time of the making of the deed, and at the death of the grantor, took the fee in the land, or whether the case is governed by the rule in Shelley's Case, and the appellant took the fee by the deed. That the children took the fee, we think there can be but little doubt. They were then in being; they were capable of taking, and we think the deed as completely vested the title in them as if they had been named in the deed. There is no room for doubt as to the intention of the grantor; the language used is too plain to admit of a construction to give to the appellant a fee in the land.

The case of *Sorden v. Gatewood*, 1 Ind. 107, is very nearly analogous. In that case one John Higbee, being seized in fee simple of a tract of land, conveyed it, for a consideration, by deed to one Sarah Gatewood during her natural life, and to her children and their assigns forever to have and to hold the said tract of land, to the said Sarah during her natural life, and to her children and their assigns forever. In that case the court says: "There being no words of inheritance in the conveyance described in the replication, and those used, 'her children,' being words of purchase and not of limitation, the rule in Shelley's Case does not apply, and a fee simple was not vested in Sarah Gatewood. She took an estate for life, and her children a vested remainder, whether for life or in fee, it is immaterial now to inquire."

We think the only fair construction which can be placed upon the language used in the deed is, that the grantor intended to part with all her interest in the land except the retaining her living off it, and that she intended only to give to the appellant a life-estate and vest the remainder in the children of the appellant, and the fee vested in the chil-

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dren of the appellant at the time of the execution of the deed. It does not appear that any children were born to the appellant after the execution of the deed, or that any living at that time have died, and no question is presented as to the rights of the survivors or those born after the execution of the deed.

There are no such words of inheritance used in this deed as to bring it within the rule in *Shelley's Case*, and give to the grantee named a fee simple, as contended on the part of the appellant. The words "children of his body" are used as words descriptive of a class who are to take the fee. See *Fountain County Coal, etc., Co. v. Beckleheimer*, 102 Ind. 76; *Andrews v. Spurlin*, 35 Ind. 262; *Doe v. Jackman*, 5 Ind. 283; *Owen v. Cooper*, 46 Ind. 524; *Shimer v. Mann*, 99 Ind. 190.

The court did not err in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

Filed March 10, 1891.

127 349
131 580

No. 14,501.

MCLEAD v. APPLEGATE, GUARDIAN.

FRAUD.—*Concealment by Attorney of Material Fact.*—If an attorney misleads his client, who is relying upon him, by the fraudulent concealment of material matters or by false statements, the transaction will be annulled by the courts.

PARTITION.—*Collateral Attack.*—A partition sale after it is confirmed can not be collaterally attacked on the ground that the commissioner, who was the attorney of the complaining party, entered into a conspiracy to defraud the plaintiff of his right in the land sold. An independent action to set the sale and transfer aside does not lie.

PLEADING.—*Complaint.*—*Sufficiency of.*—See opinion for a complaint sufficient to show fraud in a commissioner's sale of land.

From the Hamilton Circuit Court:

McLead v. Applegate, Guardian.

W. S. Christian, for appellant.

W. R. Fertig and F. M. Trissal, for appellee.

ELLIOTT, J.—The complaint alleges that Goldie Rooker and Susie Rooker are the children and only heirs of John and Malinda Rooker, deceased; that the decedents, as tenants by the entireties, owned the undivided one-half of the real estate in controversy, and that William W. Rooker owned the other one undivided half; that John Rooker died before his wife Malinda; that she subsequently married the appellant, McLead, and died in November, 1886; that in November, 1882, William W. Rooker instituted suit for partition against Malinda and her second husband, William J. McLead; that it was therein decreed that the land was not susceptible of division, and a sale was ordered; that a commissioner was appointed, and the land advertised for sale. It is further alleged that a contract was entered into between the commissioner appointed to make the sale and William J. McLead, William W. Rooker and the *Ætna Life Insurance Company*, wherein it was agreed that McLead should become the purchaser of the interest of William W. Rooker, and pay therefor \$5,300; that the insurance company should lend to McLead \$5,000, and that he and his wife, formerly Malinda Rooker, should execute a mortgage on all the land to secure the loan, and that the commissioner should report to the court that he had sold all the land for \$10,600 to Malinda McLead and her husband. It is also alleged that the commissioner did make the report as agreed; that it was false; that he did not make sale of the land to Malinda McLead; that he executed a deed to her and her husband, William J. McLead, without her knowledge or consent, falsely reciting therein that he had sold the land to her and her husband, and it is further alleged that the deed was reported and confirmed. It is still further alleged that the commissioner was, at the time the partition suit was brought and the proceedings concerning it transacted, an attorney at

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law, and, as such, the adviser and attorney of all the parties ; that Malinda was an uneducated woman, barely able to read or write ; that she did not understand the effect of the agreement, nor know the effect and nature of the transaction concerning it or the deed, but relied wholly upon the advice of the commissioner as her attorney ; that the attorney and her husband represented to her that she was only executing a mortgage upon the one-half of the land of which William W. Rooker was the owner, and which her husband had purchased ; that it was not the intention of Malinda to mortgage the part of the land owned by her, and that the attorney knew this fact ; that for the fraudulent purpose of securing the land for William J. McLead, the attorney concealed from her the fact that her land was put in jeopardy. The prayer of the complaint is that title be quieted in the children of John and Malinda Rooker to two-thirds of the land.

The insurance company obtained judgment on demurrer, and the controversy in this court is between the second husband, McLead, and the guardian of the children of Malinda McLead by her first husband, so that the question is whether the facts stated in the complaint are sufficient to authorize a judgment in favor of the wards of the appellee.

It has long been settled that a complaint is sufficient if the facts pleaded entitle the plaintiff to some relief, although they may not entitle him to all the relief demanded. *Bayless v. Glenn*, 72 Ind. 5. The question, therefore, is whether the facts stated in the appellee's complaint entitle him to some relief, and we need not inquire whether they do, or do not, entitle him to all the relief he prays.

The complaint shows that a fraud was practiced upon Malinda McLead, and that it is of such a nature as to deprive her second husband of all interest under the commissioner's deed. Where an attorney, in whom trust and confidence is reposed by a client, misleads the client by false statements or by the fraudulent concealment of material matters, the transaction will be annulled. The rule is very different in cases

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where the wrong is that of an attorney from the rule which prevails where the parties meet on equal terms and deal at arm's length. This doctrine is so well settled that it is unnecessary to do more than state it.

Appellant asserts that the fraud was practiced upon the court and not upon the parties, but he is in error in this, for fraud was practiced upon both the court and the parties. The second husband, aided by the commissioner, who was both an officer of the court and the trusted attorney of the parties, obtained a colorable title to his wife's interest in the land without having paid a penny for it. Her heirs have a right, in the appropriate action, to make the wrong-doer respond, although his wrong also constituted a fraud upon the court.

It is contended by the appellant that this action can not be maintained because the title is in the commissioner appointed to make the sale, but the answer to this contention is that the appellant is not in a situation to maintain such a position, for he can not take advantage of his own wrong.

The difficult question presented arises upon the contention that the proceedings in partition can not be collaterally attacked. The appellee's counsel does not discuss this question, but contents himself with affirming that the proceedings are not assailed, and in this he is clearly in error. If the sale stands, there is no title in the wards of the appellee, so that it is necessary to overthrow the sale in order to entitle them to recover. The rule in analogous cases is that a sale can not be collaterally impeached for fraud. *Freeman Void Judicial Sales*, sections 14, 20; *Jones v. Kokomo, etc., Ass'n*, 77 Ind. 340. In this instance there is an order confirming the report and sale, so that there is a judgment, and the case falls within the general rule that a judgment can not be collaterally impeached. That the general rule is that a judgment can not be collaterally impeached for fraud there can be no doubt. *Mannix v. State*, 115 Ind. 245, and cases cited; *Weiss v. Guerineau*, 109 Ind. 438, and authorities cited; 12

Shipman v. Keys, Administrator.

Am. & Eng. Encyc. of Law, 147 s. We regret that we are unable to find any reason for excepting this case from the general rule. There can be no doubt upon the facts stated in the complaint that in the proper action the partition proceedings may be annulled. *Nealis v. Dicks*, 72 Ind. 374. But we can not see how it is legally possible to quiet title while those proceedings remain in full force.

Judgment reversed.

Filed Feb. 27, 1891.

No. 15,981.

SHIPMAN v. KEYS, ADMINISTRATOR.

127	353
139	306
127	353
132	306
127	353
135	306
127	353
166	482

WILL.—Widow.—Election.—Rights Under the Law.—When not Waived.—

Where a testator, by his will, makes a specific provision for his widow, but does not declare that such provision is to be in lieu of that made by the law, the widow's right to the five hundred dollars allowed her by law is not waived by her acceptance of the provisions of the will, unless the assertion by the widow of the right to take both under the law and under the will would defeat the purpose of the testator as shown by the disposition which he has made of the residue of his property.

SAME.—A general disposition of all the residue of the testator's property by residuary devise or bequest, not purporting to be in lieu of the widow's absolute claim, is not enough to compel her to elect between the provision made for her by the will and her absolute claim, and she is entitled to both.

From the Henry Circuit Court.

M. E. Forkner, for appellant.

C. M. Butler, for appellee.

McBRIDE, J.—Appellant is the widow of David Shipman, deceased, late of Henry county, and the appellee is administrator, with the will annexed, of said deceased. The widow filed her petition in the Henry Circuit Court, asking that the appellee be ordered, pursuant to the terms of section 2269, R. S. 1881, to set off to her five hundred dollars in value of the personal estate of said decedent, or pay her said sum in money out of the first moneys received by him as

Shipman v. Keys, Administrator.

such administrator. A copy of the will was made a part of the petition, and the circuit court having sustained a demur-
rer to the petition this appeal is prosecuted, and that ruling
is assigned as error. This is, in legal effect, an application
for a construction of the will.

The will is short, and is as follows:

“In the name of the Benevolent Father of all: I, David
Shipman, of the county of Henry, and State of Indiana, do
make and publish this as my last will and testament:

“Item 1. I give and bequeath to my beloved wife, Ellen
Shipman, lot five (5), in block eleven (11), in the town
of Knightstown, according to the original plat of said town,
she to have and to hold the same in fee simple.

“Item 2. I give and bequeath to my said wife the fur-
ther sum of twelve hundred dollars, to be paid to her out
of the first money that may come into the hands of my
administrator after paying all my just debts.

“Item 3. After paying all my debts, and the above
legacy to my wife, I will and bequeath that the residue of
my property be equally divided between my said wife and
my children, she taking an equal share with each child.

“Signed this 10th day of October, 1890.

“DAVID SHIPMAN.

“ATTESTED: C. D. MORGAN.

“JOHN E. KEYS.”

The widow has elected to take the provision made for
her by the will, and the question we are required to decide
is whether or not she is entitled, in addition thereto, to
the statutory allowance of five hundred dollars.

Statutes similar to section 2269, *supra*, have been in force
in this State for more than forty years, and the courts have
many times been required to construe and apply them. By
its express terms the statute applies to widows, whether the
decedent died testate or intestate, and the fact that by the will
the decedent has made provision for his widow, which she
has accepted, does not necessarily deprive her of the right

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to claim and receive in addition the statutory allowance. *Cheek v. Wilson*, 7 Ind. 354; *Loring v. Craft*, 16 Ind. 110; *Dunham v. Tappan*, 31 Ind. 173; *Bratney v. Curry*, 33 Ind. 399; *Nelson v. Wilson*, 61 Ind. 255; *Whiteman v. Swem*, 71 Ind. 530; *Langley v. Mayhew*, 107 Ind. 198; *Hurley v. McIver*, 119 Ind. 53.

This court, in construing this statute, and in applying it from time to time to the varying facts presented, has endeavored to formulate general rules for its application. In some of the cases the rule as apparently indicated by the language used was, however, much too broad, and seemed to go to the extreme extent of holding that in all cases a surviving wife was entitled to, and could not be deprived of, the statutory allowance of \$500 regardless of the terms of the will.

In the case of *Langley v. Mayhew, supra*, this tendency to an undue enlargement of the rule was criticised, and the rule was limited. *Langley v. Mayhew, supra*, has since been followed in the case of *Hurley v. McIver, supra*. These cases must not be understood, however, as going further than to merely limit the rule in the manner indicated. It was not the intention of the court in these cases to swing to the opposite extreme and hold that in all cases, when provision is made by the will for the wife, her acceptance of such provision is a relinquishment of her right to the statutory allowance. To so hold would be to practically abrogate the statute as applied to widows of testate decedents. By its terms, as above stated, it applies to all widows, whether the husband dies testate or intestate, and to so limit its operation would make it apply only to such husbands dying testate as had made no provision whatever for the surviving wife. In the case of *Langley v. Mayhew, supra*, the testator, after making certain provision for his wife, added the following: "The above and foregoing being in lieu of any and all interest in my estate, both real and personal, which she might have as my widow." In such a case it can well

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be held that the widow accepting the testamentary provision thus made for her relinquishes the statutory provision. The intention of the testator is so clearly expressed that to hold otherwise would be a palpable violation of settled rules for the construction of wills.

When it clearly appears from the will, either by express statement or otherwise, that the provision therein made for the wife is intended to be in lieu of that made by the law, she must elect between the will and the law, and can not have the provision made by both. *Hurley v. McIver, supra*; *Wright v. Jones*, 105 Ind. 17; *Stewart v. Stewart*, 31 N. J. Eq. 398; *Morrison v. Bowman*, 29 Cal. 337.

When a husband has made specific provision for his widow, and has also disposed of all his other property in such a way as to make it apparent that the assertion by the widow of the right to take both under the law and under the will, would defeat the manifest purpose of the testator, she will be confined to the provisions made by the will, after she has effectually elected to take the benefits so provided. *Morrison v. Bowman, supra*; *Hurley v. McIver, supra*; *Langley v. Mayhew, supra*. While this is the rule, like many other general rules, there is sometimes difficulty in applying it to particular cases.

In the case now under consideration the husband, by the will, did make specific provision for his widow. He did not, however, in terms declare that such provision was to be in lieu of the provision which the law made for her. Would the assertion by her of her right to the allowance of \$500 defeat the purpose of the testator as shown by the disposition which he has made of the residue of his property?

In considering this question it must be borne in mind that the widow is to be favored in the construction of testamentary provisions in her behalf.

The widow's right to the allowance of \$500 is, in some of its incidents, analogous to the right of dower. The husband can not, by any act, deprive her of it against her will,

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and she may, as has been seen, take it, and in addition take that which the will gives. Of dower, the rule, as established by the overwhelming weight of authority, is :

“ If the will declares in express words that the testamentary gift is intended to be in lieu of dower, the widow is obliged even at law to elect. When, however, the will contains no such express words, every devise or bequest made to the wife is presumed to be intended as a provision in addition to her dower right, and in general she will not be required to elect. The duty of electing may arise even in the absence of any express declaration that the testamentary gift is in lieu of dower, but can only arise from a clear, unequivocal intention exhibited in provisions of the will incompatible with the right of dower. * * * ‘ If there is any thing ambiguous or doubtful, if the court can not say that it was clearly the intention to exclude, then the averment that the gift was made in lieu of dower can not be supported.’ * * * To enable us to deduce such an implied intention, the claim of dower must be inconsistent with the will, and repugnant to its dispositions, or some of them. It must, in fact, disturb or disappoint the will. * * * It is not sufficient that the will renders it doubtful whether he intended that she should have her dower in addition to the provision ; but the terms and provisions of the will must be totally inconsistent with her claim of dower in the property in which such dower is claimed.” 1 Pomeroy Eq. Jur., p. 539, section 493, and cases there cited.”

In the case of *Kelly v. Stinson*, 8 Blackf. 387, it is said : “ The cases in which the question has arisen whether the widow should be put to her election to take the benefits given to her by the will, or her dower out of the testator’s estate, are very numerous. They all seem to agree in the proposition, that nothing would deprive her of her right of dower but express declaration, or such direct and manifest repugnancy between that right and the disposition of the real estate, that they could not possibly stand together.”

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In *Lewis v. Smith*, 9 N. Y. 502, it is said: "The devises in the will must be so repugnant to the claim of dower that they can not stand together." See, also, *Ostrander v. Spickard*, 8 Blackf. 227, where it is said: "She was not restricted to the taking of one, nor could she be compelled to elect between them, except in those cases where 'her taking dower would operate to overturn the will,' or where 'the gift to her was said to be in recompense or satisfaction of dower.'"

We can see no good reason why the rules thus laid down relative to dower are not equally applicable to the widow's statutory claim to \$500.

Section 2505, R. S. 1881, requires a widow to elect between her statutory rights in her husband's lands and any testamentary provision made for her in lieu thereof. That section, however, applies only to her interest in his lands, and has no application to her statutory allowance of \$500. There is no statute requiring her to elect as to that allowance, and the rule requiring her to elect, like that relating to dower, must be deduced from the principles of equity and the common law.

If a decedent, by his will, makes provision for his widow, and specifically disposes of all the residue of his estate, so that the assertion by the widow of her statutory claim would defeat some material provision thereof, she will be required to elect, and can not take both.

A general disposition of all the residue of his property by residuary devise or bequest, not purporting to be in lieu of such absolute claim, is not enough, however, to compel an election.

Such devise or bequest will be construed as made in view of her absolute statutory rights, and subject thereto, and only operates on the residue after the payment of debts and expenses of administration, and the satisfaction of specific devises, legacies and rights.

There is nothing in the will in this case inconsistent with

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the widow's claim to take both the statutory allowance of \$500 and the provision made for her by the will.

The court below erred in sustaining the demurrer to the complaint.

Judgment reversed, with costs.

Filed March 10, 1891.

No. 14,766.

COPPAGE, ADMINISTRATOR, v. GREGG ET AL.

127	359
138	224
127	359
140	465

TRUSTEE.—*Liability to Claimant on Fund.*—A person receiving the proceeds arising from the sale of a leasehold interest, under a promise to pay off any liens on the property, becomes a trustee for all holding such liens, and, upon a proper demand, an action by such a lien-holder may be maintained against him.

SAME.—*Acceptance of Trustee's Promise by Creditor.—Demand.—What Sufficient to Constitute.*—In a complaint against such trustee by the lien-holder, it is necessary to show an acceptance by such creditor of the trustee's promise; but such acceptance is implied from the fact of bringing the action; and an acceptance and demand may be inferred from an allegation that such trustee *refused* to pay the plaintiff, and appropriated the money to his own use.

From the Montgomery Circuit Court.

L. J. Coppage, for appellant.

J. West, for appellees.

MILLER, J.—The only error assigned in this case is the ruling of the court in sustaining the demurrers of the appellees to the complaint, which, omitting formal matters, is substantially as follows:

That the appellant is administrator of the estate of Mary C. Eyler; that in April, 1886, the appellee, William P. Gregg, was the owner of and conducting a general business for the sale of agricultural implements and coal, in the city of Crawfordsville; that the premises upon which the busi-

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ness was being carried on was leased of one Hattie McEwen for the term of — years, with the privilege of renewing the same from time to time, the buildings, sheds, bins, scales, and other furniture, being owned by the lessee, and were of the value of seven hundred dollars, and the appliances for handling coal of the value of three hundred dollars; that in March, 1886, said Williams P. Gregg borrowed of the deceased three hundred and eighty dollars, and executed to her his note of that date for the amount of the loan, due one year after date, a copy of which note purports to be, but is not, made part of the complaint; that afterwards, on the 27th day of April, 1887, Gregg, to secure the payment of the note, executed a chattel mortgage on the coal office, sheds, furniture, implements and other personal property, which mortgage was on the same day recorded in the recorder's office of Montgomery county; that in August, 1888, the appellant filed his complaint against said Gregg, in the Montgomery Circuit Court, for the foreclosure of the mortgage, and in September obtained a judgment for \$462, and the foreclosure and sale of the mortgaged property; that during the pendency of the suit against Gregg, he, with intent to place said property beyond the reach of any process that might be issued on the judgment, sold to the appellee Marshall said coal office, sheds, scales and everything connected, which had not been sold or consumed prior to that time, for the sum of eight hundred dollars, which sum was at the time paid over to the appellee Orpheus M. Gregg, both of whom had actual and constructive notice of the mortgage, the pendency of the suit, and of the intent of William P. Gregg to hinder and defeat the plaintiff in the collection of his claim; that Orpheus M. Gregg then and there agreed to indemnify said Marshall against any loss he might sustain by reason of any valid incumbrance then existing against said property, and to pay off and discharge any lien or encumbrance that was enforceable against the same, but that he received said sum of eight hundred dollars

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from said Marshall without yielding or paying any other consideration than his said agreement as above set forth; that the note and mortgage had been due more than eighteen months before the suit was instituted thereon, but that the personal property in the coal office, sheds and fixtures, though of great value upon the leased real estate, would be and are of comparatively little value to be torn down, to wit, fifty dollars; that for six months prior to the sale thereof, the appellant had foreborne to bring suit and expose them to sale, at the earnest solicitation of the defendant William P. Gregg, and upon the representation of Gregg that it would entail upon him great loss by depriving him of the value thereof; that he was about to sell the said property for a good price, and promised to pay plaintiff the full amount of said note as soon as he succeeded in making a sale of the property, but that immediately on making a sale he procured a renewal of the lease of the real estate, upon which the buildings and fixtures were situate, to be made by the owner thereof to said Charles N. Marshall, and the money to be paid to said Orpheus M. Gregg, who upon the receipt thereof refused to pay the appellant the amount due him upon the note and mortgage, but at once appropriated the same to his own use; that said William P. Gregg was and still is wholly insolvent, and that said office, coal sheds and scales are unsalable and entirely unavailable as assets in their present condition; that Charles N. Marshall refuses to be made a party plaintiff, and is, therefore, made a defendant. Plaintiff, therefore, prays judgment for five hundred dollars, and that the same be declared a lien upon and enforceable against the fund in the hands of said Orpheus M. Gregg; that he be declared a trustee and ordered to pay, etc.

This complaint is somewhat peculiar, and it is not easy to determine upon precisely what theory the pleader desired to predicate his cause of action. One portion apparently proceeds upon the assumption that the action of William P.

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Gregg in transferring the mortgaged property to Marshall, and procuring a renewal of the lease to be made to him was, under the circumstances, sufficient to make him and the other participants liable for damages in an action sounding in tort.

Without entering into an extended discussion of the objection to this theory pointed out in the brief of appellees, it is sufficient to say that, eliminating from the pleading the allegations charging fraud and fraudulent intent, and looking at the facts themselves, it does not appear that either of the appellees did a single thing that the law prohibited them from doing, and, under such circumstances, it has been well said that "Fraud can not be predicated upon acts which the party charged has a right by law to do, nor upon the non-performance of acts which by law he is not bound to do, whatever may be his motive, design or purpose, either in doing or not doing the acts complained of." BIDDLE, J., in *Franklin Ins. Co. v. Humphrey*, 65 Ind. 549 (560).

Nor does it appear that the mortgaged property was of less value in the hands of Marshall, or less available as a security, than it would have been if Gregg had continued to own it.

The cases of *Duke v. Strickland*, 43 Ind. 494, and *Shearer v. Evans*, 89 Ind. 400, do not sustain the position of the appellant in this case, for in each of these cases the mortgaged property was so mixed and confused with that of the plaintiff as to be incapable of identification, and then shipped and sold so as to be entirely beyond the reach of the plaintiffs.

The other theory, and from the prayer for relief, the one we are led to believe the pleader chiefly relied upon, proceeds upon the ground that the delay of the appellant in bringing suit for a long period of time after his cause of action accrued, upon the representation of William P. Gregg that he was about to sell out the business, and his promise that he would, when he made sale, pay to the appellant the full amount of his claim, coupled with the fact that when he

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did make sale of the mortgaged property the sum of eight hundred dollars was placed in the hands of Orpheus M. Gregg to pay off and discharge any liens or encumbrances enforceable against the property, created a right of action in favor of the appellant, with the other encumbrancers, if any, to this fund, or enough of it to discharge their liens.

Taking into consideration the agreement between the appellant and William P. Gregg, the insolvency of Gregg, the condition and nature of the mortgaged property, we think it clear that the appellant is entitled in equity to treat Orpheus M. Gregg as a trustee of this fund for the benefit of himself and the other creditors, if any, having liens on the property.

The receipt of the money by Orpheus M. Gregg was a sufficient consideration for his agreement to pay the same to the lienholders, and the appellant being a lienholder is entitled to sue upon that promise.

It is not, as claimed by the appellees, necessary that the complaint should show an acceptance by the appellant of this promise, other than such as is implied by the bringing of this suit (*Carnahan v. Tousey*, 93 Ind. 561); but if it was necessary an acceptance and demand may be inferred from the allegation that Orpheus M. Gregg *refused* to pay the appellant, and appropriated the money to his own use.

It is contended that the complaint is bad because it does not show that all the property covered by the mortgage had been sold to Marshall; it is sufficient to say that this fact may in the future become important in ascertaining the amount of a recovery, but if some of the property was sold, and the promise and agreement made, the appellant is entitled to a recovery.

The complaint shows that all of the appellees are proper, if not necessary, parties to the action, in order that there may be a complete determination and settlement of the questions involved.

The judgment is reversed, with costs, and the cause re-

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manded, with instructions to overrule the demurrer to the complaint, and for further proceedings in accordance with this opinion.

Filed March 11, 1891.

No. 13,749.

DAUBENSPECK v. POOL ET AL.

MORTGAGE.—Action to Foreclose.—Plea of Payment.—Sufficiency of Evidence.—In an action on a mortgage alleged to have been lost, where, as tending to establish a plea of payment, one witness testifies that the plaintiff told him that “the mortgagor had lifted the mortgage,” and another testified that she saw the mortgage in the possession of the mortgagor, a verdict for the defendant will not be disturbed as unsupported by the evidence.

From the Marion Circuit Court.

I. Klingensmith and W. P. Atkinson, for appellant.
J. A. New, for appellees.

ELLIOTT, J.—The appellant's complaint is founded upon a mortgage alleged to have been lost, and the issue in the case was made by a plea of payment. It is asserted by appellant's counsel that there is no evidence tending to establish the defence, but in this counsel are in error. There is certainly some evidence to that effect. One witness swears that the appellant told him that “the mortgagor had lifted the mortgage,” and another swears that she saw the mortgage in the possession of the mortgagor. While the evidence of payment is not satisfactory, and while it is true that if the case were before us as triers of the facts, we would be inclined to a different conclusion from that reached by the trial court, still, the long settled rules of law constrain us to abide by the decision of the lower court.

Judgment affirmed.

Filed March 12, 1891.

Chambers v. The State, *ex rel.* Barnard, Prosecuting Attorney.

No. 14,645.

CHAMBERS v. THE STATE, EX REL. BARNARD, PROSECUTING ATTORNEY.

127	365
130	363
127	365
149	234
127	365
160	366

OFFICE AND OFFICER.—“*Lucrative Office.*”—*What is.*—The office of trustee of the Institute for the Education of the Deaf and Dumb and the office of school trustee are lucrative offices within the meaning of section 9, article 2, of the Constitution.

SAME.—*Office of School Trustee.*—*Vacation of.*—The acceptance, therefore, of the former office by an incumbent of the latter vacates the latter.

SAME.—*Forfeiture.*—*Information.*—*Necessary Averments.*—In an action to oust such incumbent from the office vacated, the information is sufficient if it states such facts as show a forfeiture of the office. Section 1131 R. S. 1881.

From the Rush Circuit Court.

J. Brown, W. A. Brown and J. M. Brown, for appellant.

W. O. Barnard, Prosecuting Attorney, *T. B. Redding, J. T. Mellett and E. H. Bundy*, for appellee.

OLDS, C. J.—This action is brought by the State on relation of William O. Barnard, prosecuting attorney, appellee, against David W. Chambers, appellant, to oust the appellant from the office of school trustee of the school town of New Castle, and to have the office declared vacant in so far as the appellant had any right to hold said office, on the grounds that after said appellant's election and qualification as such school trustee he was appointed and accepted and qualified as a trustee of the Institute for the Education of the Deaf and Dumb.

The appellant demurred to the information for want of facts, and the court overruled the demurrer, and this ruling of the court is the only error assigned.

It is contended by counsel for the appellant that the information is insufficient for the reason that section 1134, R. S. 1881, provides that “ Whenever an information shall be filed against a person for usurping an office, by the prosecuting attorney, he shall also set forth therein the name of

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the person rightfully entitled to the office, with an averment of his right thereto," and for the further reason that the office of school trustee is an office held under a municipal corporation, and is, therefore, not a lucrative office within the meaning of the clause of section 9, article 2, of the Constitution of Indiana, which provides that no person shall "hold more than one lucrative office at the same time, except as by this Constitution expressly permitted."

It is not contended but that the office of trustee of the Institute for the Education of the Deaf and Dumb is a lucrative office, and we think there can be no question but that it is, even if it were not conceded. It has been held by this court, in *Howard v. Shoemaker*, 35 Ind. 111, that the office of director of the Southern Prison is a lucrative office, and we think there is no distinction in this respect between the two offices. The decision in the case of *Howard v. Shoemaker*, *supra*, is undoubtedly correct and in harmony with all authority. It is held in the same case that the office of mayor of a city incorporated under the general laws of the State is a lucrative office, and that the election of a person holding the office of prison director to the office of mayor of a city, and his acceptance thereof, vacates his office as director. In that case it is said by the court: "Upon the other question, it is the opinion of a majority of the court that as the mayor of a city, under the act of 1867, has duties to perform, under the laws of the State, aside from those which are judicial and those of a purely municipal character, such as the taking and certifying of affidavits and depositions, the proof and acknowledgments of deeds and other instruments in writing, for which he is entitled to and may charge and receive fees, the office is a "lucrative" one within the meaning of section 9, article 2, of the Constitution of the State."

It is held in *State, ex rel., v. Kirk*, 44 Ind. 401, that the office of councilman in a city is purely and wholly municipal in its character, and such officer has no duties to perform under the general laws of the State, and although the office is a

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lucrative one it is not a lucrative office within the meaning of section 9, article 2, of the Constitution of the State. In *Mohan v. Jackson*, 52 Ind. 599, it is held that the office of city clerk is not an office within the meaning of section 16, article 7, of the Constitution of the State.

It must, therefore, be regarded as the settled law of this State that if an office is purely municipal, the officer not being charged with any duties under the laws of the State, he is not an officer within the meaning of the Constitution, but if the officer be charged with any duties under the laws of the State, and for which he is entitled to compensation, the office is a lucrative office within the meaning of the Constitution. This, although it may be a narrow construction of the Constitution, must be regarded as settled. It then remains to be determined whether the office of school trustee of an incorporated town is charged with any duties under the laws of the State such as make the office a lucrative one within the meaning of the Constitution.

It has been held by this court that the office of township trustee, who is also school trustee, and the office of supervisor, are lucrative offices within the meaning of section 9, article 2, of the Constitution. *Creighton v. Piper*, 14 Ind. 182.

Our school system is one uniform system throughout the State, and the duty to provide for a general uniform system of common schools, wherein tuition shall be without charge and equally open to all, is specially enjoined upon the legislative department of the State by the Constitution. The legislative department could not discharge this duty unless all school officers were subject and amenable to the general laws of the State, and as said in *State, ex rel., v. Haworth*, 122 Ind. 462: "Every school that has been established owes its existence to legislation; and every school officer owes his authority to the statute."

Section 4439, R. S. 1881, provides for the election of three school trustees in each city and town, who shall constitute a board of trustees, one to be elected president, one treasurer,

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and one secretary ; the treasurer and secretary are each required to give bond, to be approved by the county auditor ; and it provides that they shall receive compensation for their services, to be fixed by the common council, to be paid out of the special school revenue.

Section 4441, R. S. 1881, provides that they shall receive the special school revenue belonging to the town, and the revenue which may be apportioned to the town by the State, and shall pay out the same for the purpose for which such revenues were collected and appropriated, shall keep an account of the same, and render an account to the board of commissioners annually, and present vouchers for the amount expended.

They are also, by section 4450, R. S. 1881, required to report and furnish statistics to the county superintendent, and are charged with many other duties by law. They may be removed from office by the board of commissioners, and the president of the board is a member of the county board of education. Sections 4456 and 4436, R. S. 1881. They are also required to take enumeration of school children, and may transfer them from one town or township to another for school purposes. Sections 4472 and 4473, R. S. 1881. Indeed, they are officers whose duties are fixed by statute, though they are elected by the common council of the city or town, and their compensation is fixed by the common council. Such services, however, are designated and imposed upon them by statute, and their duties and liabilities are fixed by the statute, and we think the office is undoubtedly a lucrative one, and that it is as much an office within the meaning of section 9, article 2, of the Constitution, as any statutory office that may be created by statute within any township, town, or city. Since the commencement of this suit school trustees have been charged with other duties by the laws of 1889.

As regards the objection to the information on account of the omission to aver the name of the person rightfully enti-

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tled to the office, as required by section 1134, *supra*, in an information against a person for usurping an office, the objection is not well taken ; this is not a proceeding against a person for usurping an office. It is a proceeding instituted under the second subdivision of section 1131, against the appellant for having done an act which, by the provisions of law, worked a forfeiture of the office ; and it is provided by said section that in such a case the prosecuting attorney may proceed against him by information ; and it is only necessary to state such facts as show a forfeiture of the office. Where a person accepts an office held under the State, he vacates another held under the same sovereignty. *Foltz v. Kerlin*, 105 Ind. 221. The information is sufficient.

Our conclusion being in harmony with the ruling of the circuit court, it leads to an affirmance of the judgment.

Judgment affirmed, with costs.

Filed March 12, 1891.

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No. 15,353.

THE INDIANAPOLIS CABLE STREET RAILROAD COMPANY
v. THE CITIZENS STREET RAILROAD COMPANY.

MONOPOLY.—State or Municipality Granting.—Constitution.—As a general rule neither the State nor a municipal corporation can grant or create a monopoly. The clause in the Constitution forbidding the granting of "privileges or immunities which upon the same terms shall not equally belong to all the citizens," does not declare all monopolies unlawful. That clause applies only to such things as are of common right, and is merely to be applied to such things as are in their nature a monopoly.

CORPORATION.—Grant of Franchises.—How Construed.—Exclusive Privileges.—Grants of franchises by public corporations to individuals or private corporations are to be strictly construed, and no exclusive priv-

127	369
128	480
129	369
130	73
127	369
132	121
127	369
139	303
127	369
159	48
127	369
160	115
127	369
163	59
127	369
169	631
169	632

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lege passes, unless it be plainly conferred by express words or necessary implication.

SAME.—*Grant to, Construed Against the Grantee.*—A grant made by the Commonwealth, or by a municipality under authority from the Commonwealth, is to be taken most strongly against the grantee, and nothing is to be taken by implication against the public, except what necessarily flows from the nature of the terms of the grant.

SAME.—*Special Charters.—Conflict of Interests.*—If the sovereign grant a special charter to a corporation to conduct a particular business, without granting any exclusive privileges over that business, the same sovereign may, in like manner, grant special charters to other corporations to carry on the same business, and if there is a conflict of profits between them the first has no remedy.

STREET RAILWAY.—*City may Prescribe Motive Power.—Violation of Grant of Power.—Rival Companies.*—A city, having control over its streets, may prescribe the motive power to be used in moving cars, and when it prescribes one kind of power the company can not use another; and in a contest between two rival street railway companies for the possession of a street, one of which is using a motive power not authorized by its charter, the other company may attack its right to such street by showing such violation of its franchise.

SAME.—*Exclusive Possession of Street.—Power of City to Grant.—First to Occupy Protected.*—A city can not give an exclusive right to a street railway company to occupy all its streets, to the exclusion of all other companies, and so prevent it afterwards giving similar grants to other companies. But if it make such a grant and then make a similar grant to another company, that company which first occupies a street, or which first enters upon the construction of a particular line of street railroads, and has expended its money in the prosecution of the work, is entitled to the possession of such street, or to the streets over which such particular line passes, although the effect is that such company thus acquires the exclusive possession of such street or streets for the purposes of a street railroad.

From the Marion Superior Court.

J. B. Black, U. J. Hammond, E. S. Rogers, S. M. Shepard and C. Martindale, for appellant.

H. C. Allen, F. Winter and J. B. Elam, for appellee.

COFFEY, J.—This was an action by the appellee against the appellant, brought for the purpose of enjoining the appellant from constructing a street railroad on certain streets in the city of Indianapolis, and to enjoin it from interfering

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with the appellee in its construction of a street railroad on said streets.

It is alleged in the complaint that the Citizens Street Railway Company is a corporation organized under the laws of this State for the purpose of building, maintaining and operating street railways, propelled by animal power, in the streets of the city of Indianapolis; that after the organization of said corporation the common council of said city, on the 18th day of January, 1864, passed an ordinance, by section two (2) of which, and by the terms of section three (3) of a subsequent ordinance passed on the 18th day of September, 1865, said corporation was granted power and authority to construct and lay a single or double track for such railway lines upon and along the course of all the streets of the city of Indianapolis, including Meridian, Circle, Market, Georgia and Alabama streets, and Home, Central and Lincoln avenues; that by the terms of said ordinance said tracks were to be laid in the center of said streets where practicable, except where a double track was contemplated, in which case the tracks were to be laid so as to make the center of said tracks the center of the street; that the grant of said right was to extend for the full term of thirty-seven years; that said city was not to grant to any person or corporation any privilege which would impair or destroy the rights and privileges of said corporation; that said corporation promptly accepted said ordinance and the other ordinances amendatory thereof, and at once laid and commenced operating a system of street railways in the city of Indianapolis, and complied with the terms of said ordinance, and has never at any time given to the authorities of said city any cause of forfeiture, and has been continually extending said system at an expense of many hundreds of thousands of dollars, and has never abandoned any of its rights; that the appellee is a corporation organized for the purpose of constructing, maintaining and operating street railways in the city of Indianapolis, propelled by animal power, and that in April, 1888, it purchased

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from said Citizens Street Railway Company all its property of every nature and description, including its cars, tracks, rights, franchises, real estate, houses, mules, harness, etc., with a view to succeeding to the rights of said company in the continuation, maintenance and operation of its system of street railways in said city ; that in April, 1888, said city, by a duly adopted ordinance, granted to the appellee all the rights, franchises and privileges of every nature and description belonging to said Citizens Street Railway Company in the streets of said city, and thereupon appellant took possession of all such property, rights, franchises, etc., and has ever since been operating the said road under and in accordance with the authority conferred on it by its charter from the State of Indiana, and by its contract with said Citizens Street Railway Company, and by the said ordinance granting and confirming to it as the successor of said Citizens Street Railway Company all the rights of said last named company in the premises ; that the appellant is a corporation organized under the laws of this State for the purpose of constructing, operating and maintaining lines of street cars in the city of Indianapolis, and is claiming the right to construct, operate and maintain such lines of cars in said city upon the streets hereinbefore named ; that appellee has begun the construction of a line of street railway, commencing and communicating with a track, or an existing and completed line, known as the Illinois street line, at the junction of Illinois and Georgia streets, extending thence east on Georgia street to Meridian, thence north on Meridian to Washington street, and connecting on Washington street with the Washington street line ; and, also, thence north on Meridian to Circle, thence east on Circle to Market, and thence east on the Market street line ; and, also, diverging at Maryland street from said Meridian street line, and extending thence east on Maryland street to Pennsylvania street, and thence north on Pennsylvania street to Washington street, and connecting with said Washington street line ;

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that it has, also, commenced another line, commencing at the intersection of Pennsylvania and Market streets, extending thence east on Market street to Alabama, thence north on Alabama street to Home avenue, thence east on Home avenue to Central avenue, and thence north on Central avenue to the State fair grounds.

That on said last named line it has done a large part of the work for the construction of the same with the greatest diligence; that on Tuesday the 24th day of July, 1888, it commenced work on said Georgia and Meridian street line, and is diligently prosecuting the same; that by the contract as set forth in said ordinances it is required to lay its said tracks in the center of said streets, and in case of double tracks the same must be laid at such distance from the center of said streets as will make the central point between the two tracks the center of the street; and that under its said contract and ordinances it has no right to lay said tracks at any other points in said streets; that the appellant claiming to have authority or license from said city has entered upon some of the same streets, to wit, Meridian and Market streets, and is threatening to enter upon others of said streets, and is building, and is threatening to build, a double track street railroad in the center of said streets, occupying precisely the same ground that the appellee is required by its ordinance to occupy, and is thereby seeking to, and will if it is permitted so to lay its tracks and maintain the same, exclude the appellee from the use of said streets; that in 1887 said city, by an ordinance duly passed, granted or attempted to grant to appellant the right to build and operate a line of street cars on Meridian, Circle, Market and Alabama streets, and on Home and Central avenues, the same to be operated as cable cars, that is, cars propelled by a cable revolving under ground and moved by a stationary steam engine at the termini of said lines; that long before it attempted to lay any track on said streets or any of them it disclaimed any purpose to accept said ordinance or license, and refused

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to accept the same ; that on the — day of June, 1888, it did enter upon Meridian street, between Circle and Maryland streets, and proceeded to construct along the center of said street upon the very ground the appellee is entitled to occupy, a double track line to be used and propelled by animal power, or possibly by electrical motors, and at the time it thus tore up said street and constructed its track thereon it had no license or authority whatever in the premises to build any line whatever except said cable line, which it disclaimed any purpose of building ; that on the — day of —, 1888, said city passed an ordinance authorizing the appellant to build a line of street railroad on said streets to be operated by electric motors, the wires for said motors to be under-ground ; that said ordinance was general in its terms, simply permitting said lines on said streets and not specifying the parts of said streets to be occupied by said lines ; that after the appellee had commenced, as it had the right to do, to build its said tracks on Georgia and Meridian streets and on the other streets named, the appellant commenced to tear up said streets, and has commenced laying track on Market and Meridian streets, and is threatening to lay its said track on the other streets, herein above named, along the center of the same, thereby excluding the appellee from said streets.

The appellant filed an answer in two paragraphs, and also a counter-claim, and on a subsequent day filed a third paragraph of answer, but as no question is made on these pleadings they need not be set out.

The appellee also filed a second paragraph of complaint, but we deem it unnecessary to refer now to the allegations contained therein, as all the questions arising on this paragraph arise upon the special finding of facts hereinafter referred to in this opinion.

Upon issues formed the cause was tried at a special term of the superior court, resulting in the granting of a perpetual injunction against the appellant, from which it ap-

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pealed to the general term and assigned error. The judgment of the special term was affirmed, from which the appellant appeals to this court.

The court, at special term, made a special finding of the facts in the cause and stated its conclusions of law thereon.

In this special finding is set out the several ordinances of the city of Indianapolis under which the respective parties to this suit claim the right to construct and operate street railroads on the streets of said city.

It appears by the special finding of facts in this cause, among other things, that on the 18th day of January, 1864, the common council of the city of Indianapolis passed an ordinance by which it granted to the Citizens Street Railway Company of Indianapolis, and its successors, the right to lay a single or double track for passenger railway lines, with all necessary and convenient tracks for turn-outs, side-tracks, and switches, in, upon, and along the course of the streets and alleys of the city of Indianapolis. The ordinance required the company to use animals only as a motive power. The track is required to be laid in the center of the street, in all cases where it is practicable to so lay it, except where a double track is contemplated, in which case the track may be laid at such distance from the center of the street as will make the center point between the two tracks the center of the street; no track is to be laid within twelve feet of the sidewalk upon any street in any case where it is practicable to avoid it. The rights and privileges granted by the ordinance are to extend over a period of thirty years from its passage, and the city thereby binds itself during said period not to grant to, or confer upon any other person or corporation any privileges which will impair or destroy the rights and privileges granted to the Citizens Street Railway Company. It is provided that if, at any time during said period of thirty years, the common council of the city of Indianapolis should be of the opinion that a line of street railroad should be constructed upon any street in said city, over

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which no line exists, it may so declare by resolution, and if said company shall fail for a period of thirty days after service of notice, by the delivery of a copy of such resolution to it to certify to the common council of said city a copy of a resolution of its directors ordering the construction of such line, with the affidavit of the president attached, that it is the design, in good faith, of the said company to proceed immediately with the construction of said line of railway, the common council may, by resolution, declare all privileges and right of way over and in said line of street railway forfeited; and may grant the same to some other person or company.

By an ordinance passed by said council on the 18th day of September, 1865, it is declared to be the true intent and meaning of the ordinance of January 18, 1864, to grant to the Citizens Street Railway company the right to construct and operate street railways on any and all streets in the city of Indianapolis, whether named in said ordinance or not; and by the latter ordinance such permission is granted as to all the streets then in said city as well as to all streets that might thereafter be added by the extension of the corporate limits of the city.

Immediately after the passage of these ordinances the Citizens Street Railway Company commenced the construction and operation of a system of street railways in the city of Indianapolis under said ordinances, and continued to construct and operate such system until the 24th day of April, 1888, at which time it had thirty-eight miles of street railroad tracks. On the 24th day of April, 1888, it sold and transferred all its property, including said track, cars, mules, harness, etc., to the appellee, which transfer was duly approved by the common council of the city of Indianapolis. At the time of the approval of said transfer the common council passed an ordinance granting to the appellee all the right and privileges possessed by the Citizens Street Railway Company. Immediately after obtaining possession of the property, the appellee began to extend the system of

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street railroads already existing, and between the time of its purchase and the 1st day of September, 1889, built nearly fifteen miles of additional track.

On the 22d day of June, 1887, the common council of the city of Indianapolis, by an ordinance duly passed, granted to the appellant permission and authority to lay, construct, operate and maintain a single or double-track street railway, with all the necessary and convenient tracks for turn-outs, side-tracks, switches and terminals in, upon and along all streets and alleys of said city then existing or which might thereafter be laid out.

The ordinance required the appellant to construct, by the 1st day of November, 1888, what was known as cable lines, operated by under-ground cable in connection with stationary engines, on the following portions of said streets: One line commencing at the Union Passenger Station at Jackson Place; thence north on the new fifty foot street leading from Jackson Place to Georgia street; thence east upon Georgia street to Meridian street; thence north on Meridian street to Circle street; thence west on Circle street to Market street; thence west on Market street to Tennessee street; thence north on Tennessee street to New York street; thence west on New York street to Mississippi street; thence north on Mississippi street to Seventh street; thence east on Seventh street to Tennessee street; thence north on Tennessee street to Twelfth street, and thence east on Twelfth street to the State fair grounds.

One line commencing at the intersection of Meridian street and the south boundary of Circle street, thence east on Circle street to Market street, thence east on Market street to Alabama street, thence north on Alabama street to Home avenue, thence east on Home avenue to Central avenue, thence north on Central avenue to Clyde street, thence east on Clyde street to College avenue; and one line commencing at the intersection of Georgia street and Meridian street, thence east on Georgia street to Pennsylvania street, thence south

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on Pennsylvania street to Madison avenue, and southwesterly on Madison avenue to Minnesota street.

On the 23d day of June, 1887, the appellant filed notice of its acceptance of the terms of this ordinance, but nothing was done looking to the construction of railway tracks until about the 1st of January, 1888. At that time John W. Dudley, a civil engineer, made some surveys for the New York Cable Railway Construction Company, which work he prosecuted at intervals between the 1st of January and the 13th day of March, 1888. During this time he surveyed a line called the Michigan street line, extending from Fall creek bridge southwesterly to West street, and thence south-easterly to Michigan street, and eastward on Michigan street to the United States arsenal grounds, and thence northerly on Keystone avenue to Clifford avenue, thence easterly on Clifford avenue to Rural street. He made a profile of this line. He was employed to do this work by W. W. Dudley, the general manager of the New York Cable Railway Construction Company, who was at the time president of the Indianapolis Cable Street Railroad Company. Between the 1st and 6th of May, 1888, said John W. Dudley resumed his surveys for the New York Cable Railway Construction Company, and within a few days thereafter the angle formed by the central line of Georgia street and the central line of Meridian street was measured and wooden stakes driven at the intersection of these two lines, to form a basis upon which to order curve construction at said intersection. A similar stake was driven at the intersection of the central line of Meridian street and the street car tracks of the Citizens Street Railroad Company on Washington street, and the angle was measured there in like manner. The same measurements were made at the intersection of the central line of Circle street and Meridian street, and a line was measured around the southeast quarter of Circle street. There was, also, a similar stake driven at the intersection of the center line of Market street and the center line of the

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Citizens Street Railroad Company's tracks on Pennsylvania street, and the angle there measured. At the intersection of the center line of Market and Alabama, and the center line of the Citizens Street Railroad Company's tracks on Massachusetts avenue, a similar stake was driven and a like measurement of angle made. At the intersection of the center line of Morris street and Alabama street a similar stake was driven ; and, also, both at the intersection of the center line of Alabama street, south of Morrison street and north of Morrison street, there being an off-set or jog on Alabama street at Morrison of about fifteen feet. The angles were also measured on Morrison street.

Like measurements and stakes were driven at the intersection of Sixth and Alabama streets, Sixth street and Central avenue, Central avenue and Ninth street, and the central line of the Citizens Street Railroad Company's tracks upon College avenue on Ninth street ; and at a point about two hundred feet east of College avenue on Ninth street, a similar peg was driven in the center of Ninth street. Plats were made showing these measurements. All said surveying, measuring, platting, were begun between the 1st and 6th of May, 1888, and continued for and done within three or four days, by John W. Dudley and his assistants. During the last eight days of May, 1888, John W. Dudley resumed work for the New York Cable Railway Construction Company, and made a survey, beginning on Market street, on the east side of Circle street, extending to the intersection of the center line of Alabama street and Market street, and thence north on Alabama street nearly to New York street. This survey consisted of a measurement of the distance along the center line of the street, and pegs were driven at intervals of one hundred feet. These pegs were driven to furnish reference marks for a double line of track of street railroad extending along the line of the route measured. In the latter part of May, 1888, the New York Cable Railway Construction Company became insolvent, and, after the first of

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June that year, no more work was done for it in Indianapolis. The work done by or for said company was done for and on behalf of the appellant. The 1st of June, 1888, a contract was made between W. W. Dudley and associates, subscribers for the majority of the stock of the Indianapolis Cable Street Railroad Company, and Mr. Tom L. Johnson and his associates, by which the latter obtained an assignment of said stock subscriptions, none of the stock of said company having then been issued. On the 1st of June, 1888, W. W. Dudley arranged with Tom L. Johnson to order for the appellant a mile of single track material, and on short notice to procure materials of three miles of double track, in all seven miles of single track; in pursuance of this order, a mile of track material was sent immediately, and at the same time they made arrangements for tools and employed agents and workmen for laying track on Meridian street and other streets. On the 2d or 3d day of June, 1888, said John W. Dudley began work for the Indianapolis Cable Street Railroad Company upon the streets of Indianapolis. He drove stakes at intervals of fifty feet upon the center line of Meridian street, between the south line of Circle street and the north line of Pearl street, by direction of W. W. Dudley, the president of the appellant's company. These stakes were driven for the purpose of furnishing reference points by which to align tracks of a street railroad. On the 4th day of June, 1888, the appellant began laying street railroad track, beginning at the south line of Circle street, and extending southward on Meridian. The track laid at this time on Meridian street, south of Circle street, was a double track street railway, two tracks being laid at equal distances from the center of the street, with their inner rails about four feet and four inches apart, each track occupying, with the ties supporting it, a space of eight feet. It was not a cable street railroad, and was not built for the purpose of being operated as such, the idea of building a cable road having been abandoned about the first of June of that year.

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The work of laying his double track road on Meridian street, extending south from the Circle, was continued until the north line of Washington street was reached, when Washington street itself was omitted and work resumed on the south side of Washington street, extending said tracks southward on Meridian until they reached Pearl street, making a distance of about two hundred and twenty-five feet between Circle street and Washington street, and about one hundred and sixty-two feet between Washington street and Pearl street. This work was completed between Washington street and the Circle, and was in progress south of Washington street, when work was suspended by the request of the city attorney of Indianapolis, which request was based upon the ground that the track being laid on Meridian street, south of Circle street, was not a cable street railroad, and not authorized by the ordinance giving the appellant company authority to lay street railroad tracks where those were laid. These tracks laid on Meridian street, between Circle and Pearl streets, could be used to run cars drawn by animals or propelled by the overhead wire and pole system of electricity, or by cars operated by an electrical storage battery, and could not be operated by cables or under-ground wires, as there was no excavation in the street below said tracks to constitute a chamber in which any under-ground wires could be operated. The appellant, at the time it constructed these tracks, did not construct them to be operated by under-ground cables or wires.

Soon after the transfer to the appellee of the rights of its predecessor hereinbefore mentioned, the general manager of that company gave orders to construct a number of additional street car lines in the city of Indianapolis, and among other lines was a line extending from the Union Station to the State fair grounds.

On the 6th day of June, 1888, the appellee began work on Market at the east line of Pennsylvania street, and continued to excavate and lay track toward the east on Market

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street, until the square between Pennsylvania and Delaware streets were completed; and the square between Delaware and Alabama streets was well advanced towards completion when work was stopped by the street commissioner of the city of Indianapolis. On the 10th of June, 1888, an injunction suit was brought by the appellee to prevent further interference with the work by the city authorities, and upon this injunction being granted, work was resumed on Market street between Delaware and Alabama, and continued upon Alabama street between Market and New York streets, said work on Alabama street being well advanced towards completion on the 24th day of July, 1888.

The appellant caused its said engineer and his assistants, on the 24th day of July, 1888, between the hours of eight and twelve in the morning, to survey Georgia street between Illinois and Meridian streets, and to drive stakes similar to those hereinbefore mentioned on the center line of Georgia street, from a point therein, east of Illinois street and west of Meridian street, and at about one-third of the distance eastward between Illinois and Meridian streets, said point being at the west side of a street running north from the Union Depot and Jackson Place to Georgia street, and named McCrea street, thence eastward to the intersection of the center lines of Georgia and Meridian streets, said stakes being driven to the surface of the street at intervals of fifty feet along said course, for the purpose of furnishing a reference mark for the construction by the appellee of a double track street railroad upon Georgia and Meridian streets, to connect with the line of street railroad which the appellant had built, as before stated, between Circle and Pearl streets, upon Meridian street.

At the time the appellant caused said survey and staking, commencing between the 1st and 6th days of May, 1888, and continuing for three or four days, there was no street railway track of any company upon and along Meridian street between Louisiana street and Circle street, or on and along

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Circle, or on and along Market street, between Circle street and Alabama street, or on and along Alabama street between Market street and Sixth street, or on and along Sixth street between Alabama street and Central avenue, or on and along Central avenue between Sixth street and Ninth street, or on and along Ninth street.

At the time the surveying and staking, within the last eight days of May, 1888, was done, there was no street railroad track of any company on and along Market street between Circle street and Alabama street, or on and along Alabama street, between Market street and Seventh street.

On the 6th day of June, 1888, at 1 o'clock P. M., the appellee first began work upon a line of street railway on Market street, between Pennsylvania and Alabama streets, by placing a force of men there and commencing the digging up of the street to put in a double-track street railroad, and laid there some ties and track between that time and the third day thereafter, when said work stopped for the time being, no work having been done at that time on any other part of the line of which the line put in was to constitute a part.

On the 24th day of July, 1888, the appellant, besides causing the survey and staking on Georgia street, made arrangements for assembling its workmen to resume construction the next morning on Georgia street, between Illinois and Meridian streets, and on Meridian street between Louisiana street and Circle street, and for such purpose caused its tool boxes to be deposited at the northeast corner of Meridian and Georgia streets, between three and four o'clock in the afternoon. About the same hour a force of the appellee's workmen commenced work on Georgia street, at or near its intersection with Illinois street, and began digging up said Georgia street eastward from Illinois street, and constructing upon said Georgia street at that place toward Meridian street a double-track street railway. About 7 o'clock on the evening of the same day the appellant placed its force of

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workmen upon Meridian street, at the crossing thereof with Georgia street, and commenced digging up said Meridian street, and constructing on and along the same a double-track street railway, beginning said digging and construction at the north side of said crossing, and extending the same southward across said crossing, and on Meridian street toward Louisiana street, there being then no street railroad track constructed or in course of construction upon Meridian street, except said portion constructed by the appellant heretofore mentioned. On the same evening, and immediately after the appellant had commenced said digging and construction, the appellee, dividing its force of workmen so working upon Georgia street, and transferring a portion of its said force of workmen from Georgia street to Meridian street north of Georgia street, caused its said workmen to dig up Meridian street between Georgia and Maryland streets, and to construct thereon a double-track street railway; and the same night the appellee caused its said force of workmen to place its double-track iron curve for said railway at said crossing of Georgia and Meridian streets, partly upon cross-ties placed by the appellant in excavations made by it, but did not fasten them, and for the purpose of so placing said curve drove and pushed from said place the workmen of the appellant, and afterward appellee removed the ties of appellant, and replaced them with its own.

Thereupon, on said night of the 24th of July, 1888, and on succeeding days, the appellant constructed and finished its double-track railway upon Meridian street between Georgia and Louisiana streets.

On the 25th day of July, 1888, the appellee caused its workmen to continue the work of constructing a double-track street railway on and along Meridian street between Georgia and Maryland streets.

On the 25th day of July, 1888, the appellant, besides continuing its work of construction on Meridian street between Louisiana and Georgia streets, also proceeded to, and did,

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dig up and prepare Meridian street from Pearl street to and beyond Maryland street, and place and construct there a double-track street railway. Also, on the same day, the appellant dug up and prepared Market street from Circle street eastward to Pennsylvania street, and placed cross-ties and rails, and partly constructed a double-track street railway, on and along said portion of Market street, there being then no other railroad track upon said portion of Market street.

On the evening of the 25th day of July, 1888, the appellant's workmen being at work on Circle street between the southern intersection with Meridian street and its eastern intersection with Market street, and having been notified of the issuance of a restraining order, which on that date was granted in this cause against it, restraining it from work on said line, and because thereof, ceased work upon its said line, the same being the first line designated in section 2 of General Ordinance No. 19 of 1887, as amended by section 1 of General Ordinance No. 34 of 1888.

After the issuing of the said restraining order, and after the granting of a temporary injunction, which was issued against the appellant on the 28th day of July, 1888, enjoining it from working upon said line, and while said restraining order and said temporary injunction were pending and in force, the appellee continued its work of construction, and constructed and finished, and has been and is using and operating with animal power, a continuous double-track street railway on and along the following streets: Georgia street from Illinois street to Meridian street, Meridian street from Georgia street to Circle street, Circle street from Meridian street south of Circle street to Market street east of Circle street, Market street from Circle street eastward to Alabama street, Alabama street from Market street to Home avenue, Home avenue from Alabama street to Central avenue, Central avenue from Home avenue to Tenth street.

In the construction of its said line mentioned in the nine-

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teenth paragraph of the special finding, while said restraining order and said temporary injunction were in force against the defendant, the appellee took up and wholly removed from their places in the streets all the tracks so constructed by the appellant on Meridian street and Market street, placing the material thereof in the street gutters, and placing and constructing its tracks of said line in the same places from which it had so removed the appellee's said tracks.

In constructing said line of street railway track from Illinois street to Tenth street, upon the route before described, and in extending its line on Meridian street south of Georgia street, appellee removed from its position twenty-six hundred feet estimated as single track street railroad, which was worth \$1.75 a foot when in place in the street, and 75 cents a foot when removed and lying upon the side of the street as hereinbefore stated, except four hundred feet on Market street, between Circle and Pennsylvania streets, which had only been partially completed, and was worth \$1.50 as it lay in the street before removed to the sides thereof.

The city council of the city of Indianapolis, by an ordinance passed on the 2d day of July, 1888 granted to the appellant further time, extending to the 1st day of January, 1889, within which to complete certain designated lines of cable street railway, with the right to construct either a cable or electric railway, which ordinance was accepted by the appellant on the 23d day of July, 1888.

As a part of said system of street railways of which the appellee took possession and proceeded to operate on the 23d day of April, 1888, there was and is a line of street railway extending on Washington street along its entire course through said city; also a double-track street railway extending from Louisiana street northward on Illinois street to Seventh street, connecting at Washington street with said line thereon; also a double-track street railway connecting with said Washington street line at the intersection of

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Washington and Pennsylvania streets, and running thence northward on Pennsylvania street to Seventh street, and thence east on Seventh street to Alabama street, thence north on Alabama street to Ninth street; also a street railway connecting the said Pennsylvania street line at the intersection of Pennsylvania and Ohio streets, and running thence north-easterly on Massachusetts avenue to New Jersey street, thence north on New Jersey street to Fort Wayne avenue, thence northeasterly on Fort Wayne avenue to Central avenue, thence north on Central avenue to Christian avenue, thence east on Christian avenue to College avenue, thence north on College avenue to Ninth street; also a line of street railway connecting the said Washington street line at the intersection of Washington and East streets, and running thence north on East street to Ohio street, thence east on Ohio street to Noble street, thence north on Noble street to Massachusetts avenue, thence northeast on Massachusetts avenue to Peru street, thence north on Peru street to Home avenue.

The appellant has never disclaimed, abandoned, or consented or agreed to the surrender or repeal of its rights or privileges under and through its said ordinances numbered 19 and 34, hereinbefore mentioned.

The double-track street railways commenced and constructed by the appellant on Meridian and Market streets, as hereinbefore stated, were of such construction as to be capable of and suitable for operation as an electrical street railway using the storage battery system for propelling the cars thereon, and were suitable for or capable of being operated by means of poles or overhead wires. Said storage battery system is one method of propelling cars run on street railways, but as yet is mostly experimental, not in general use, and expensive when used to propel cars over street railways. The purpose of the appellant to use such storage system as a motive power in propelling its cars over the line of its railways in the city was not declared in writ-

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ing, or in any way made known to the city or its officers. It was, however, orally so declared about the 1st of June, 1888, by some of the officers of the defendant.

Upon these and other facts set out in the special finding, not necessary to be here repeated, the court stated as a conclusion of law that the appellee was entitled to an injunction against the appellant enjoining it from constructing a street railroad in the center of the streets named in the complaint and entered a decree accordingly.

It is not denied that the common council of a city, in this State, has the exclusive control and management of the streets and alleys within the corporate limits of the city. Indeed, it is conceded on all sides that the common council of the city of Indianapolis possessed the power to grant to the appellee, as well as to the appellant, the privilege of building and operating street railroads upon the streets of the city.

It is contended by the appellant, however, that the appellee is claiming that the city of Indianapolis, by its common council, granted to it the exclusive right to occupy, for street railroad purposes, the center of all the streets in the city, and it is argued that such grant, if made, amounts to a monopoly, and that it is, for that reason, void.

As a general rule neither the State nor a municipal government can grant or create a monopoly. *Citizens' Gas, etc., Co. v. Town of Elwood*, 114 Ind. 332. In that case it was said by this court: "The spirit and policy of the law forbid municipal corporations from creating monopolies, by favoring one corporation to the exclusion of others." Our Constitution provides that "The General Assembly shall not grant to any citizen, or class of citizens, privileges or immunities which, upon the same terms, shall not equally belong to all citizens." But it must not be understood by this rule that all monopolies are unlawful. Many things which are lawful are from their nature and of necessity monopolies. Such are patent-rights, copyrights, the right to keep

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a ferry, and many other things which might be mentioned. As a street railroad company has no legal right to lay its track upon the streets of a city without the permission of the common council, if the city should grant such right to one company and refuse to grant it to another, the company to which the right was granted would have a monopoly, until such time as the common council should grant a similar right to some other person or company. So if the common council should grant to a street railroad company the right to lay its track on certain streets which were too narrow to admit of being occupied by other street railroad tracks, such company would have a monopoly of such streets. It is plain, therefore, that while monopolies, as a general rule, are unlawful, there are many exceptions to the rule. The rule applies only to such things as are of common right, and is never to be applied to such things as are in their nature a monopoly.

Judge Elliott, in his valuable work on Roads and Streets, in discussing this question, at page 566, says: "To deny the power of the Legislature to make a grant that is of necessity of a monopolistic character, would lead to the unwarranted conclusion that in no case can the Legislature grant the right to lay and operate a street railway in a road or street, for, if the power to make such a grant be conceded, it necessarily and unavoidably results that the occupancy of the part of the road or street is exclusive, as two railways can not occupy the same space."

It is held in many respectable authorities that an exclusive right, in such cases, may be granted for a reasonable and fixed period. *New Orleans, etc., Co. v. Louisiana, etc., Co.*, 115 U. S. 650; *New Orleans, etc., Co. v. Rivers*, 115 U. S. 674; *Des Moines, etc., Co. v. Des Moines, etc., Co.*, 73 Iowa, 513; *St. Tammany Water Works v. New Orleans Works*, 120 U. S. 64.

This brings us to a consideration of the ordinance passed by the common council of the city of Indianapolis granting

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to the Citizens Street Railway Company the right to construct and operate street railroads upon the streets of the city of Indianapolis, and to whose rights the appellee claims to have succeeded. This ordinance, together with the ordinance subsequently passed, declaratory of the intention of the parties at the time of its passage, grants to the Citizens Street Railway Company the right to lay its track, either single or double, on all the streets of the city of Indianapolis, confining it, however, to the center of the street where practical. This right is not declared in the ordinance to be exclusive.

Grants of franchises by public corporations to individuals or private corporations are to be strictly construed, and no exclusive privilege passes, unless it be plainly conferred by express words or necessary implication. *Citizens' Street R. W. Co. v. Jones*, 34 Fed. Rep. 579.

A grant made by the commonwealth, or by a municipal corporation, under authority from the commonwealth, is to be taken most strongly against the grantee, and nothing is to be taken by implication against the public, except what necessarily flows from the nature of the terms of the grant. *Mayor, etc., v. Ohio, etc., R. R. Co.*, 26 Pa. St. 355; *Birmingham, etc., R. W. Co. v. Birmingham, etc., R. W. Co.*, 79 Ala. 465.

The ordinance granting to the Citizens Street Railway Company the right to construct street railways on the streets of the city of Indianapolis does not grant to it the exclusive right to construct street railways thereon. Indeed, it is not claimed by the appellee, as we understand the briefs on file, that it possesses the exclusive right to construct street railroads on the streets of the city, but it is conceded that the common council may grant to other persons or corporations the same right. Where the sovereign has granted a special charter to a corporation to conduct a particular business, without granting any exclusive privileges over that business, the same sovereign may, in like manner, grant

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special charters to other corporations to carry on the same business, and where there is a conflict of profits between them the first has no remedy. *Crawfordsville, etc., Co. v. Smith*, 89 Ind. 290; *Charles River Bridge v. Warren Bridge Co.*, 11 Peters, 420.

Acting upon this well-known principle the common council of the city of Indianapolis granted to the appellant the right, also, to construct, maintain, and operate street railroads upon the streets of the city of Indianapolis.

At this point the question arises as to what were the respective rights of the appellant and the appellee, in so far as they had the right to occupy the streets of the city, as between themselves.

As to unoccupied streets, our opinion is that they stood upon an equality; and that the controversy resolved itself into a question of first occupancy.

Judge ELLIOTT, in discussing this question, in his work on Roads and Streets, page 570, says: "If the company which secures the first grant actually occupies the streets it is authorized to use, then there is much reason for affirming that its right to the part of the street actually occupied and used is paramount and exclusive. By actually taking possession of the street and using it for the accommodation of the public, the company first in point of time does such acts as vest its right. But to have this effect the company, as it seems to us, must take possession in good faith and for the purpose of constructing and operating such a railway as the grant contemplates. * * * While it is, as we believe, true that some act must be done vesting the inchoate right conferred by a general grant, still, we do not regard it as essential that manual possession should be taken of all of the streets or roads embraced in the general grant or license. If the company having the prior right enters upon the work of constructing a system, and with reasonable diligence and in good faith does actually construct a considerable part of the system, it ought not to lose its rights, unless it has failed

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to comply with a proper demand to complete the system or has unreasonably delayed its completion. * * *

"Conflicting claims asserted by rival companies claiming under general grants, must often be settled by applying the rule that the first to rightfully occupy the street has the better right."

We have thus copied copiously from the work above referred to, because we think it states the law accurately and concisely. See, also, *Waterbury, etc., Co. v. Dry Dock, etc., R. R. Co.*, 54 Barb. 388; *Titusville, etc., R. R. Co. v. Warren, etc., R. R. Co.*, 12 Phil. 642; *Morris, etc., R. R. Co. v. Blair*, 9 N. J. Eq. 635; *Denver, etc., R. W. Co. v. Canon City, etc., R. W. Co.*, 99 U. S. 463.

Where a company has entered upon the construction of a particular line of street railroads and has expended its money in the prosecution of the work, it would be manifestly unjust to permit some other person or company, after the commencement of the work, to jump in and appropriate any portion of the streets involved in such line while the former was diligently prosecuting the work, and thus destroy the projected line to the ruin of the company engaged in its construction.

If this could be done no person or company would undertake the construction of a system of street railroads; but to hold the right to such line money should be expended in its construction, and the work, with a view of its completion, should be diligently prosecuted without intermission unless stopped by circumstances over which the projector has no control.

In this case, as we understand the special finding, the appellee, in the early part of June, 1888, entered upon the construction of a line of street railroads in the city of Indianapolis, which appropriated a portion of the streets described in the complaint. Such line was determined upon and ordered by the general manager of the appellee soon af-

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ter the transfer made to it by the Citizens Street Railway Company.

It does not appear that the appellant did anything under its charter prior to the 24th day of July, 1888.

Disregarding its charter, which authorized the construction of a cable road, it proceeded to construct one of an entirely different character. Indeed, it wholly abandoned the idea of constructing a cable road, and when engaged in constructing one of a different character, in violation of its charter, it was stopped by the city attorney, for the reason that it was acting wholly without authority. The appellant, by taking possession of the streets of Indianapolis with a view of constructing a street railroad other than a cable road, acquired no rights in such streets either as against the appellees or the city. It was a mere trespasser. A municipal power, having control over the streets, may prescribe the motive power to be used in moving street cars, and when it prescribes one kind of power the company can not use another.

As the grant of a special charter or franchise to a corporation is construed strictly against the corporation, where the right to use one motive power is prescribed the company can not successfully maintain its right to use another or different power. Elliott Roads and Streets, p. 560; *People, ex rel., v. Newton*, 48 Hun, 477; *People, ex rel., v. Newton*, 112 N. Y. 396; *Denver, etc., R. W. Co. v. Denver City R. W. Co.*, 2 Col. 673; *Citizens' St. R. W. Co. v. Jones, supra; Birmingham, etc., R. W. Co. v. Birmingham, etc., R. W. Co., supra*; *Mayor, etc., v. Ohio, etc., R. R. Co., supra*; *North Chicago City R. W. Co. v. Town of Lakeview*, 105 Ill. 207.

It is urged, however, that the appellee can not inquire as to the motive power by which appellant intended to move its cars, as that was a question entirely between the appellant and the city of Indianapolis. We are not inclined to adopt this view. If the appellee had no interest in the question other than that possessed by a citizen of the city of

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Indianapolis, doubtless it could not raise the question now under consideration, but the appellant and the appellee had equal rights in the streets in controversy. Neither had the exclusive right to the streets or any portion thereof until occupied under its charter. The first to take possession, in good faith, under the charters granted to it, acquired the superior right. When the appellant claims, therefore, that it entered the streets of Indianapolis and took possession under the terms of its charter, in good faith, with a view of constructing the line of street railroad, which it had the right to construct under the terms of its charter, we think it competent for the appellee to allege and prove that it did not enter under the terms of its charter, and that instead of constructing a line of cable street railroad, it was acting in violation of its grant and was a mere trespasser. There can be no pretense that the appellant did any work conforming to the rights granted it by the city of Indianapolis prior to the 24th day of July, 1888, as it did not accept the right granted it to construct an electric railroad until the 23d day of that month. In the meantime the appellee had taken possession of the streets in controversy, and was diligently prosecuting the work of constructing a line of street railroad which included these streets. The rights acquired by the appellant on the 23d day of July could have no retroactive operation so as to affect the rights of the appellee vested by its possession.

It follows, from what we have said, that as the appellee commenced the construction of a line of street railroads under the terms of its charter, which included the streets in controversy, and was in good faith diligently prosecuting the work to completion prior to the time the appellant commenced work to construct a line of street railroads pursuant to the terms of its charter, the appellee has the superior right.

It is claimed, however, that the Citizens Street Railway Company could not sell and transfer to the appellee its franchises, and that appellee by its purchase acquired no rights.

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We regard this as an immaterial question. The appellee is a duly organized corporation, for the purpose of owning and operating a street railroad in the city of Indianapolis. It is not denied that by its purchase it acquired all the property of the Citizens Street Railway Company, except its franchises. The city of Indianapolis, about the date of the transfer of the property, granted to the appellee all the rights, privileges, and franchises possessed by the Citizens Street Railway Company.

Assuming, without deciding, that the Citizens Street Railway Company could not sell and transfer its franchises, still the right of the appellee to own, construct, and operate its railroad upon the streets of the city of Indianapolis is complete by reason of the grant above named.

We have carefully examined all the questions presented by the record, and argued in the able briefs of counsel in this case, and find no error for which the judgment should be reversed.

Judgment affirmed.

Filed June 19, 1890.

ON PETITION FOR A REHEARING.

COFFEY, J.—An earnest petition, supported by an able brief, has been filed in this case, in which it is contended by the appellant that this court erred in holding that the line of street railway constructed by the appellee was one continuous line.

It is contended that the pleadings and finding of facts demonstrate that the appellee, at the time this suit was commenced, was engaged in the construction of two separate and distinct lines, and that the facts found by the court show that as to one line the appellant was the first to occupy the streets over which it passes.

Under this claim we have again carefully examined the pleadings and finding in the cause, and have reached the conclusion that the appellant's contention can not be sus-

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tained. It is true that some isolated words and sentences in the original complaint seem to sustain the position assumed by the appellant, but the amended complaint filed by the appellee proceeds upon the theory that the work done by the appellee was done pursuant to a determination to construct one continuous line of railway extending from the intersection of Georgia and Illinois streets to the State fair grounds, over the streets named in the complaint. From the filing of this amended complaint the cause, so far as the appellee was concerned, seems to have proceeded throughout upon this theory.

With some hesitation we have reached the conclusion that the special finding sustains the theory of the appellee.

There seems to have been a race between the appellant and the appellee as to which should first acquire the actual possession of Georgia street. In the matter of actual construction the appellee was first to break ground, but before this occurred the appellant had surveyed the street and had driven stakes.

The survey by the appellant, and the work done by the appellee on this street, all occurred on the same day, and, for all practical purposes, we think the parties may be regarded as having taken the actual possession of this street at the same time. If the appellee, however, long prior to this time, had commenced the construction of a line of railway extending from the intersection of Georgia and Illinois streets to the State fair grounds, which included the portion of Georgia street now in controversy, and was diligently prosecuting the work of constructing such line at the time appellant took possession, the former had the better right, for the appellant could not appropriate any portion of a line then in process of construction.

Petition overruled.

Filed March 11, 1891.

Earnhart v. Earnhart et al.

No. 14,886.

127	307
147	101

EARNHART v. EARNHART ET AL.

WILL.—*Life-Estate.*—*Rule in Shelley's Case.*—Where the testator in his will devises an estate to his son for life, and provides that at the son's death the persons who would have inherited from the son, had he owned the fee at the time of his death, shall take the same and in the same proportion as the law would cast it upon them, and declares that the provisions of the item shall "only vest in the devisee a life-estate * * * and no more," the rule in *Shelley's Case* does not apply and the son takes only a life-estate.

From the Noble Circuit Court.

L. W. Welker, for appellant.

H. G. Zimmerman and *F. M. Prickett*, for appellees.

OLDS, C. J.—John Earnhart died testate. By item three of his last will and testament he gave to his granddaughter, Harriet Cook, the only child of his deceased daughter, Susannah, five hundred dollars, to be paid within one year after his death, or within one year after the death of his wife, if she survived him. It is specifically stated in said item that said legacy shall be paid by devisees in said will other than his wife, to wit: "Nelson James, Lewis Thomas and William Earnhart, Jane Wolf and Ellen Wolf, in equal shares, the shares of each to be a charge upon the lands hereby devised to him or her respectively." Item 10 of the will is as follows:

"I give and devise to my son, William Earnhart, for and during the term of his natural life, subject to the life-estate of my said wife therein, the following described real estate in Noble county, Indiana, to wit: The north half of the northwest quarter and the west half of the northwest quarter of the northeast quarter of section thirty-four (34) in township thirty-four (34) north, range nine (9) east. At the death of said William Earnhart I give and devise said lands in fee simple to the persons who would have inherited

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the same from the said William Earnhart had he owned the same in fee simple at the time of his death, the same to go to said persons in the same manner and in the same proportions as though said William Earnhart had owned the same in fee simple at the time of his death. But the provisions of this item should only vest in the said William a life-estate in said lands, and nothing more."

The appellant brings this action, setting out a copy of the will, and alleging that he owns the fee simple title to the land described in item ten of the will, and asking that the will be so construed as to give to him the fee simple title to said land, and that his title be quieted to the same, making the other devisees and the executor parties defendant, alleging that they claim some interest in said land adverse to the appellant.

The appellees demurred to the complaint for want of facts, which demurrer was sustained, exceptions reserved, and this appeal is prosecuted, assigning such ruling as error.

It is contended that item ten in the will is governed by the rule in Shelley's Case, and that it gives to William Earnhart a fee simple title to the land.

It is settled that the rule in Shelley's Case is recognized as law and a rule of property in this State; but we do not think it applicable to the item of the will under consideration. The rule does not apply where it unequivocally appears that the persons who are to take are not to take as heirs of the grantees, or devisees. In this case it is clearly and distinctly expressed, so that it unequivocally appears from the language that it was the intent of the testator, that the appellant should take only a life-estate in the land. It then makes a further devise of the remainder of the estate in the land to other persons, describing them, not by name, but in a definite manner, as the persons who would inherit the same if the fee was in the appellant, and distributes it between such persons in the same proportions as they would inherit from said appellant. The words used in making dis-

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position of the remainder are words of purchase, descriptive of the persons to whom the fee is devised. If in one item of the will the testator had devised to his son William Earnhart a life-estate in the particular tract of land, and in another item had made disposition of the remaining fee after his death to the wife and children of the said William, naming them, there could be no possible question but that William would take a life-estate, and his wife and children would take the fee; nor do we think there can be any difference if, instead of naming them, the will described them as the wife and children, stating that they should take one-third to the wife, and the two-thirds to go to the children in equal shares. If it described them as the heirs who would inherit from William, in the same proportion as the law would cast it upon them, certainly there can be no difference whether the testator make such disposition of his property in one or in separate items, so it be clearly expressed. In item ten of the will under consideration, the intention of the testator is clearly expressed to be that William take only a life-estate, and a separate and distinct devise of the remaining fee at his death to the heirs of William, in the same proportion they would have inherited had William owned the same in fee. It is clearly expressed that such heirs shall not take by descent from William, but by purchase from the testator. This being clearly expressed by the will, the rule in Shelley's Case does not apply. See *Fountain County, etc., Co. v. Beckleheimer*, 102 Ind. 76. When it clearly appears that the testator did not intend to grant a fee, then the devise will not be so construed as to vest one. *Allen v. Craft*, 109 Ind. 476.

The will provides that the appellant shall pay his portion of the legacy given to the granddaughter, Harriet Cook, and makes it a charge against the land.

There was no error in sustaining the demurrer to the complaint.

Judgment affirmed, with costs.

Filed March 11, 1891.

Merritt v. Richey.

No. 14,764.

MERRITT v. RICHEY.

127	400
146	51
127	400
158	367

REAL ESTATE.—Purchaser at Sheriff's Sale.—Title.—Relation Back to Rendition of Judgment.—The title of the purchaser of land at a sheriff's sale relates back to the rendition of the judgment on which the sale is made. **SAME.—Wrongful Possession.—Damages.**—After the expiration of the year for redemption the purchaser at the sheriff's sale is entitled to a judgment for possession, and for damages to the amount of the rental value against a purchaser from the judgment debtor, subsequent to the rendition of the judgment, who wrongfully continues in possession after the expiration of the year for redemption.

SAME.—Loss by Fire.—Liability of Occupant.—The purchaser from the judgment debtor does not become a mere trespasser by remaining in possession, since his entry into possession was rightful, and he is not liable for the loss of the building by fire, the result of an accident, during his occupancy of the property.

PRACTICE.—Cross-Errors.—Amount of Recovery.—Question of, How Presented.—Where a plaintiff desires to present a question as to the amount of recovery, the correct practice is to move for a new trial, and assign the proper cause in the motion.

From the Clinton Circuit Court.

J. V. Kent, for appellant.

J. N. Sims, for appellee.

ELLIOTT, J.—On the 1st day of May, 1887, David P. Bainer recovered judgment against Marcellus Burton and others, and on the 11th day of September, Bainer assigned the judgment to the appellee. On the 23d day of October, 1880, Richey, the appellee, caused an execution to issue on the judgment, and on the 11th day of December the sheriff sold the land in controversy to the appellee. A certificate was issued to the appellee, and, at the proper time, a deed was executed to him. At the time the judgment was rendered Burton was the owner of the land, but subsequently conveyed it to the appellant, who took possession of the property. At the time the appellant took possession there was a house on the land, but it was consumed by fire on the

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30th day of January, 1885. It was of the value of three hundred and fifty dollars. The rental value of the premises from the 11th day of December, 1880, until the 30th day of January, 1885, was seventy-two dollars per annum; since the day last named the rental value has been eighteen dollars per annum. The appellant made permanent improvements of the aggregate value of one hundred and fifteen dollars. The rental value of the property aggregates four hundred dollars, and the appellee was prevented from receiving it by the wrongful act of the appellant in remaining in occupancy of the property. The facts exhibited in our statement are condensed from the special finding made by the court, and on these facts judgment was rendered in favor of the appellee for the possession of the real estate and four hundred dollars damages.

The facts fully justify the conclusion that the appellant was wrongfully in possession of the land, and without right excluded the appellee, for the latter became the owner by virtue of the sheriff's sale and deed. The title of the appellee relates back to the rendition of the judgment (*Paxton v. Sterne*, *ante*, p. 289; *Wright v. Tichenor*, 104 Ind. 185; *Orth v. Jennings*, 8 Blackf. 420), hence the appellant was, after the expiration of the year for redemption, wrongfully in possession of the property, and the appellee was entitled to a judgment for possession and for damages. The decision in *Dobbins v. Baker*, 80 Ind. 52, is not opposed to this conclusion; on the contrary, it gives it full support.

Counsel is in error in asserting that the court allowed damages for the house destroyed by fire.

The judgment in favor of the appellee is so clearly right that there is little reason for discussion.

Cross-errors have been well assigned by the appellee, and he has adopted the appropriate mode of presenting the questions his counsel has argued. He moved for a new trial and reserved the proper exceptions. This correctly presents the

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question as to the amount of the recovery, for, where a plaintiff desires to present such a question the correct practice is to move for a new trial and assign, as was done in this instance, the proper cause in the motion. While there is no statute providing for the assignment of cross-errors, the right to make such an assignment has been asserted in many of our decisions, and has long been recognized by the rules of the court. Where the proper steps are taken below there is no necessity for a separate appeal by the appellee, nor, as a general rule, for a separate transcript, but it may be in some cases necessary for the appellee to secure additions to a transcript prepared at the instance of the appellant. *Feder v. Field*, 117 Ind. 386. The jurisdiction having been obtained for one purpose, it exists for all purposes, and there is neither reason nor necessity for dissecting a case into parts. *Chapell v. Shuee*, 117 Ind. 481; *Ex parte Sweeney*, 126 Ind. 583, and cases cited.

The question presented by the assignment of cross-errors is as to the right of the appellee to recover for the house burned during the appellant's occupancy of the property. There is no finding that there was any negligence on the part of the appellant or his tenant, and, as the presumption is ordinarily against culpable negligence, we must assume that there was no negligence. See authorities cited note 2, p. 639, *Elliott Roads and Streets*. It must, under this familiar and settled rule, be assumed that there was no culpable negligence, and, as a necessary sequence, that the fire was the result of an accident. The general rule is that for loss resulting from an accident there is no liability in cases not arising out of contract. *Nave v. Flack*, 90 Ind. 205 (210); *Wabash, etc., R. W. Co. v. Locke*, 112 Ind. 404 (411); *Beatty v. Gilmore*, 16 Pa. St. 463; *Hale v. Smith*, 78 N. Y. 480. If this case can be taken out of the general rule it must be for the reason that the appellant wrongfully continued in possession, for his entry into possession was rightful. He was not a mere trespasser in possession without color of right, and can not be

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treated as one who is guilty of a positive wrong, involving moral turpitude. We can perceive no reason for holding a party who enters, as the appellant did, into the possession of property, liable for accidental injuries to property, to which injury no fault of his proximately contributed. Nor can we find any authority which lends support to such a doctrine.

We have examined the question upon the theory adopted by counsel, but it is proper to say that under the rule declared in *Bottorff v. Wise*, 53 Ind. 32, it seems that, even if a right of action existed, it could not be made available in an action for the recovery of real estate. It is, however, unnecessary to do more than make a passing suggestion upon this point.

Judgment affirmed, with five per cent. damages.

Filed March 18, 1891.

No. 15,992.

COLVIN v. THE STATE.

CRIMINAL LAW.—Embezzlement by Guardian.—Affidavit and Information.—Sufficiency of.—Statute of Limitations.—An affidavit and information against a guardian for the embezzlement of the funds of his ward charged that the defendant on the day of his appointment as guardian, October 10th, 1879, collected money and other personalty belonging to the ward; that the ward became of age March 5th, 1889, and that on November 28th, 1890, a demand for settlement was made, which the defendant refused to comply with, and converted the money to his own use.

Held, that as the date of the demand for settlement, though not the date of the reception of the money by the guardian, was within the period of limitation, the affidavit was sufficient, and that a prosecution instituted December 19th, 1890, was not barred by the statute.

Held, also, that an averment in the information, that the accused fled from the county and concealed himself, is not sufficient to avoid the operation of the statute of limitations, where there is no averment as to how long the absence or concealment continued.

GUARDIAN AND WARD.—Guardian.—Void Order of Removal.—Collateral At-

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tack.—An *ex parte* order of the circuit court removing a guardian, made without notice to the guardian, and without appearance by him, is void and may be collaterally attacked.

From the Hamilton Circuit Court.

R. Graham and J. Stafford, for appellant.

S. D. Stuart, Prosecuting Attorney, *W. Booth* and *J. Keeling*, for the State.

MCBRIDE, J.—This was a prosecution by information charging appellant with embezzlement under section 1952, R. S. 1881. Appellant was convicted and sentenced to one year's imprisonment in the State Prison. The errors assigned are:

1. Error in overruling a motion to quash the affidavit and information.
2. Error in overruling a motion in arrest of judgment.
3. Error in overruling a motion for a new trial.

The first two errors assigned challenge the sufficiency of the affidavit and information.

The affidavit and information charge that the appellant was appointed guardian of one William S. Sedenberg, on the 10th day of October, 1879, by the Hamilton Circuit Court; that he then and there collected and received money belonging to his said ward to the amount of \$200, and other property also belonging to him; that said infant became twenty-one years of age on the 5th day of March, 1889, and on the 28th day of November, 1890, demanded a settlement with, and accounting by, his said guardian, and the payment of said money to him, but that said guardian failed and refused so to do, and unlawfully retained said money and converted the same to his own use. All necessary technical averments are used, and the charges are sufficiently specific and full.

The contention of appellant is that the conversion dates from the reception by the guardian of the money, and that the prosecution was barred by the statute of limitations. The

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prosecutor seems, in framing the affidavit and information, to have been impressed with the same idea, and inserted therein the following averment with a view to avoiding the statute :

"That, on or about the 15th day of September, 1880, the said George Colvin fled from the county of Hamilton, and so concealed himself that process could not be served upon him."

This, the prosecutor argues, is a sufficient compliance with section 1597, R. S. 1881, to avoid the operation of the statute.

Section 1597 provides that "If any person who has committed an offence, thereafter is absent from the State, or so conceals himself that process can not be served upon him, or conceals the fact that the offence has been committed, the time of absence or concealment is not to be included in computing the period of limitation."

Here the averment is that the accused fled from the county and concealed himself, but there is no averment as to how long he remained absent or concealed. For aught that appears, he may have returned the next week and have ever since remained in that county and unconcealed. It is only the time of absence or concealment that is omitted in computing the period of limitation. If the sufficiency of the information depended upon this averment it would be bad. It is, however, good without this.

The affidavit and information charge that the conversion occurred when the demand for settlement was made by the ward, on the 28th day of November, 1890.

The motion for a new trial presents this question: On the 15th day of September, 1880, the Hamilton Circuit Court made an order removing the guardian. Appellant insists that having been removed as guardian more than ten years before the prosecution was instituted, the conversion, if any, occurred at that time, and hence the prosecution was barred. The order removing the guardian, or purporting to

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remove him, was *ex parte*, and was made without any notice whatever to the guardian, and without appearance by or for him. The order was therefore void, as he could not be removed without notice. *Dibble v. Dibble*, 8 Ind. 307; *Dibble v. Dibble*, 9 Ind. 161; *Martin v. Beasley*, 49 Ind. 280.

An order by the circuit court removing a guardian, which appears upon its face to be *ex parte* and to have been made without any notice of any character, and with no finding by the court that there was any notice, being absolutely void, may be attacked collaterally. Notwithstanding the making of this order appellant continued to be guardian.

We find no error in the record.

Judgment affirmed.

Filed March 13, 1891.

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No. 15,892.

NICHOLS ET AL. v. THE STATE.

STATUTE.—Construction.—Particular Description Followed by a General One.—

If words of a particular description in a statute are followed by general words that are not so specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things, or cases, of like kind to those designated by the particular words.

CRIMINAL LAW.—*Enticing Female to House of Ill-Fame.*—*What is, and is not, the Offence.*—“*For the Purpose of Prostitution.*”—“*Or Elsewhere.*”—The statute making it an offence to entice or take a female of previous chaste character to a house of ill-fame, “or elsewhere,” “for the purpose of prostitution,” has no application to persons who entice, allure or solicit females of chaste character to accompany them to any convenient place for the sole purpose of having illicit intercourse. It applies to such persons only as allure chaste females to houses of ill-fame, or other places of like character, to have common, indiscriminate, meretricious commerce with men, or where they may become prostitutes. The phrase “with the intent of then and there rendering her a prostitute,” in an indictment, is the equivalent of the phrase “for the purpose of prostitution.” Section 1993, R. S. 1881.

127	406
127	338
127	406
129	284
127	406
128	582
127	406
134	658
136	224
138	237
127	406
137	78
127	406
140	444
141	111
141	359
127	406
144	211
144	659
144	681
146	489
127	406
148	78
148	608
149	77
127	406
157	373
107	406
161	505
162	112
162	182
127	406
165	302
127	406
167	182
168	389

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SAME.—*Indictment.—Insufficiency.*—An indictment charging that the defendant, at a certain date, in a certain county, enticed and took a certain named female of chaste character, then and there being, to a certain named city of the State, with the intent then and there of rendering her a prostitute, without designating or describing the particular house or place in such city to which she was taken or enticed, is not sufficient to withstand a motion to quash, but is sufficient to withstand a motion in arrest of judgment.

SAME.—*Indictment.—Arrest of Judgment.*—If an indictment or information does not contain all the essential elements of a public offence, a motion in arrest of judgment will be sustained. But if it contains all such essential elements, even though imperfectly stated, it will be held sufficient to withstand such a motion.

SAME.—*Presumption as to Proof.*—After verdict and judgment thereon, in case of a conviction, the Supreme Court assumes, in the absence of the evidence, where the pleading is broad enough, that there was proof of all the elements necessary to constitute the crime charged.

SAME.—*Information.—Jurisdictional Facts.—Need not Show.*—It is not necessary to allege in an affidavit and information the facts showing the right of the State to thus prosecute the accused. If such facts do not exist a plea in abatement must be filed. Section 1733, R. S. 1881.

SAME.—*Punishment Less than Statute Requires.*—A defendant can not object to a verdict which does not assess a fine in addition to the punishment assessed, even though the statute requires the fine also to be assessed.

JURISDICTION.—Presumption.—If a court of general jurisdiction, having jurisdiction over the subject-matter of the action, render judgment in the cause, it will be presumed, in the absence of a showing to the contrary, that the jurisdiction was acquired in some legal manner over the person before the rendition of such judgment.

From the Delaware Circuit Court.

B. F. Davis, W. H. Martz, R. Gregory and A. C. Silverberg, for appellants.

A. G. Smith, Attorney General, J. G. Leffler, Prosecuting Attorney, J. W. Ryan, W. H. Thompson and G. W. Cromer, for the State.

COFFEY, J.—This was a prosecution instituted in the Delaware Circuit Court, by affidavit and information, against the appellants, Doan Nichols and Fannie Wiley, and one Ret. Shetterly, charging them with the crime of abduction. The affidavit in the cause charges "that Doan Nichols, Ret.

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Shetterly, and Fannie Wiley, at the county of Delaware, in the State of Indiana, on the 14th day of May, 1890, did then and there unlawfully and feloniously entice and take away from the city of Muncie, in the county aforesaid, one Almeda O. Watters, a female of chaste character, then and there being, to the city of Indianapolis, in the county of Marion, in said State, with the felonious intent then and there of rendering the said Almeda O. Watters a prostitute."

The information in the cause follows the affidavit.

A trial of the cause, before a jury, resulted in a verdict finding the appellants guilty as charged. The court, over a motion for a new trial and a motion in arrest of judgment, rendered judgment on the verdict from which this appeal is prosecuted.

No motion was made in the circuit court to quash the affidavit or information, nor is the evidence in the record.

Section 1993, R. S. 1881, upon which this prosecution is based, is as follows: "Whoever entices or takes away any female of previous chaste character from wherever she may be to a house of ill-fame, or elsewhere, for the purpose of prostitution, shall be imprisoned," etc.

It is insisted by the appellants that the circuit court erred in overruling their motion in arrest of judgment, because the affidavit and the information in the cause do not state a public offence. The principal objection urged is that neither the affidavit nor information contains a description of any particular house or place to which Almeda O. Watters was taken for the purpose of rendering her a prostitute.

The rule is, that where words of a particular description in a statute are followed by general words that are not so specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed as applicable to persons or things, or cases, of like kind to those designated by the particular words. Bishop Stat. Crimes, sections 245-6; *State v. McCrum*, 38 Minn. 154; *Berg v. Baldwin*, 31 Minn. 541; *Miller v. State*, 121 Ind. 294.

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Following this rule of construction it was held in the case last cited that the words "or elsewhere," as found in the statute under consideration, should be construed to mean a house of ill-fame or some other place of like character, where prostitution of the character practiced at houses of ill-fame or assignation was, or was intended to be, carried on. The purpose of the statute was to punish persons, whether male or female, who should engage in the business of inducing females of chaste character to become inmates or frequenters of houses of ill-fame, assignation or other places for purposes of prostitution. It has no application to persons who entice, allure, or solicit females of chaste character to accompany them to any convenient place for the sole purpose of having illicit intercourse. It applies to such persons only as allure chaste females to houses of ill-fame, or other places of like character, to have common, indiscriminate, meretricious commerce with men, or where they may become prostitutes. *Fahnestock v. State*, 102 Ind. 156; *Osborn v. State*, 52 Ind. 526; *Commonwealth v. Cook*, 12 Met. 93; *State v. Stoyell*, 54 Maine, 24; *Carpenter v. People*, 8 Barb. 603; *State v. Ruhl*, 8 Iowa, 447; *People v. Plath*, 100 N. Y. 590; *Miller v. State*, *supra*.

Prostitution, in its limited sense, is the practice of a female offering her body to an indiscriminate intercourse with men—the common lewdness of a female.

Section 2003, R. S. 1881, declares that "Any female who frequents or lives in houses of ill-fame, or associates with women of bad character for chastity, either in public or at a house which men of bad character frequent or visit; or who commits fornication for hire—shall be deemed a prostitute."

If, therefore, it sufficiently appear from the affidavit and information before us that the appellants enticed the person therein named, a female of previous chaste character, to a house of ill-fame or other place of like character for the purpose of prostitution, a public offence is charged.

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The charge is that they enticed her away from the city of Muncie, in the county of Delaware, to the city of Indianapolis, in the county of Marion. No particular house or place in the city of Indianapolis is designated or described. In our opinion this affidavit and information would not have been sufficient to withstand a motion to quash, had such a motion been interposed in the circuit court.

The appellants were entitled to a more particular description of the place to which the person named was enticed had they insisted upon such a description.

It has often been adjudged that where an indictment or information does not contain all the essential elements of a public offence a motion in arrest of judgment will be sustained. *Greenley v. State*, 60 Ind. 141; *Lowe v. State*, 46 Ind. 305; *Shepherd v. State*, 64 Ind. 43; *Hoover v. State*, 110 Ind. 349.

It is contended by the State, however, that the failure to describe the particular house or place at the city of Indianapolis to which the female named was taken for the purpose of prostitution, was a defect cured by verdict; that a place is in fact stated, though imperfectly.

The argument is that while there is no inference of law that the city of Indianapolis is an immoral place, or that it is like, in character, to a house of ill-fame, the court will take judicial notice that there are many places in the city of Indianapolis used for various purposes; that while the court can not judicially know that there are immoral places in the city, the inference of morality is met by the charge that the female was taken there with the intent of rendering her a prostitute, and that she was taken to a place suitable for that purpose.

There are many defects in pleading, both in civil and criminal cases, which would be fatal on demurrer or on motion to quash, which are not available on a motion in arrest of judgment. *Graeter v. State*, 105 Ind. 271; *Trout v. State*, 107 Ind. 578; *Greenley v. State*, *supra*; *Lowe v. State*, *su-*

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pra; Shepherd v. State, supra; McCool v. State, 23 Ind. 127; State v. Noland, 29 Ind. 212; Gillett Crim. Law, 562; Bicknell Crim. Practice, 310; State v. Murphy, 8 Blackf. 498; Peters v. Banta, 120 Ind. 416; Colchen v. Ninde, 120 Ind. 88; Hare v. State, 4 Ind. 241.

Section 1891, R. S. 1881, provides that "In the consideration of the questions which are presented upon an appeal, the Supreme Court shall not regard technical errors or defects or exceptions to any decision or action of the court below, which did not, in the opinion of the Supreme Court, prejudice the substantial rights of the defendant."

In the case of *Trout v. State, supra*, it was held that this statute is applicable to criminal cases. With this statute in view the rule in this State is that where the indictment or information contains all the essential elements of a public offence, even though imperfectly stated, it will be held sufficient to withstand a motion in arrest of judgment. *Trout v. State, supra; Graeter v. State, supra.*

After verdict in this case, as the appellants were found guilty, we must assume, as we do in all cases where the pleading is broad enough, that there was proof of all the elements necessary to constitute the crime charged. *State v. Murphy, supra.*

The charge is that the female named in the information was enticed to the city of Indianapolis, and under this charge we think the State might have proven the particular house or place to which she was enticed, and that such house or place was like unto a house of ill-fame. As we have seen, the evidence is not in the record, and we have no means of knowing its character.

We think that the affidavit and information in this case contain all the essential elements of a public offence, but they are defective by reason of the uncertainty and imperfection in the manner of describing the place to which the female was enticed. As we have seen, such imperfection will not warrant the court in arresting the judgment on motion.

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In our opinion the court did not err in overruling the motion in arrest of judgment on the ground that the affidavit and information do not state a public offence.

It is further objected that the phrase "with the intent of then and there rendering the said Almeda O. Waters a prostitute," found in the affidavit and information, is not equivalent to the phrase "for the purpose of prostitution," found in the statute.

It is not necessary that the exact words used in the statute shall be employed in the indictment or information. Equivalent words are sufficient. *State v. Miller*, 98 Ind. 70; 1 Bishop Crim. Proc., section 612.

The phrase "with the intent of rendering her a prostitute," as used in this information, we understand to mean, with the intent to yield her up, to deliver her over, to cause her to be, or to become a prostitute. As we have seen the word "*prostitute*" includes a female who surrenders her person to indiscriminate intercourse with men. If the abduction was intended to cause her to become a prostitute, she was abducted for the purpose of prostitution.

We do not think the affidavit and information defective in the matter of which this complaint is made.

It is also contended that the record does not disclose such a state of facts as authorized a prosecution by affidavit and information under the provision of section 1679, R. S. 1881. In this connection it is argued that the statute does not relieve the State from the necessity of charging in the affidavit, in cases prosecuted upon affidavit and information, the facts which confer the right to prosecute without an indictment returned by the grand jury.

The question here presented has been decided adversely to the contention of the appellants, and we are not inclined to depart from these decisions. *Hodge v. State*, 85 Ind. 561; *Powers v. State*, 87 Ind. 97.

The contention that it does not appear by the record that a state of facts existed which authorized a prosecution in

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this case by affidavit and information, proceeds upon the theory that the facts necessary to confer jurisdiction upon the circuit court must appear affirmatively by the record.

The circuit court is a court of general jurisdiction, and every presumption in favor of its jurisdiction will be indulged by this court, unless something to the contrary appears. It has the exclusive jurisdiction to try and punish felonies in counties where there is no criminal court. Where a court of general jurisdiction has jurisdiction over the subject-matter of the action, if it renders judgment in the case, it will be presumed, in the absense of a showing to the contrary, that jurisdiction was acquired in some legal manner over the person before the rendition of such judgment. *Pickering v. State*, 106 Ind. 228; *Exchange Bank v. Ault*, 102 Ind. 322; *Mathis v. State*, 94 Ind. 562; *Pointer v. State*, 89 Ind. 255.

If such a state of facts existed as did not authorize a prosecution of the appellants by affidavit and information, they should have been pleaded by way of abatement, or incorporated into the record in some other appropriate manner. There is nothing in the record showing that the circuit court did not have jurisdiction in this cause, and as it assumed to act, we must presume that jurisdiction existed.

Indeed, under the provisions of section 1733, R. S. 1881, it is not necessary to state in the information in a prosecution for a felony the facts showing the right to prosecute by information, nor is it necessary to prove such facts, unless put in issue by a verified plea in abatement.

Finally, it is contended by the appellants, that the court erred in rendering judgment against them on the verdict because the jury failed to assess a fine against them as part of the punishment.

The verdict, with this exception, is perfect on its face. The appellants entered an objection to rendering judgment on the verdict on account of the defect above stated, but did not move for a *venire de novo*.

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Of this objection we think it sufficient to say that the appellants should not be heard to complain of the fact that they did not receive all the punishment contemplated by the law which the jury found they had violated. In the case of *Griffith v. State*, 36 Ind. 406, it was said by this court: "It will hardly be contended, we presume, that the prisoner can successfully object that the punishment imposed was less than might legally have been inflicted." While it is true that the jury might have imposed a fine in this case in addition to the imprisonment fixed by their verdict, their failure to do so was an error in favor of the appellants and gives them no cause for complaint in this court.

We have given all the questions presented by the record in this cause a careful consideration and feel that no error was committed in the circuit court which would warrant a reversal of the judgment.

Judgment affirmed.

Filed Feb. 25, 1891; petition for a rehearing overruled March 19, 1891.

127	414
129	476
137	414
184	4
135	581
127	414
143	656
127	414
147	108
127	414
150	403
127	414
162	118

No. 14,781.

DELLER v. HOFFERBERTH.

NEGLIGENCE.—*Pleading.*—*Particularity.*—*Indefiniteness.*—In an action for negligence it is not necessary that the complaint specify, with any great degree of particularity, the elements entering into the cause of the action in order that it may withstand a demurrer. If the defendant desires a more particular statement, a motion that it be inserted is the proper practice.

SAME.—*Steam Engine out of Repair.*—A steam engine in use which is so out of repair as to be in an unsafe condition for such use is a nuisance.

SAME.—*Lessor not Liable.*—A lessor is not liable for an explosion of steam boilers he leases to a lessee caused by defects arising therein subsequently to the lessee's taking possession thereof, even though they be

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in such a condition that they will naturally become dangerous if the tenant fails to repair them.

From the Vanderburg Circuit Court.

A. C. Tanner and W. Ireland, for appellant.

D. B. Kumler and V. Bisch, for appellee.

MILLER, J.—This was an action brought by the appellant against the appellee for personal injuries.

The complaint is in two paragraphs. The first paragraph alleges that, on the 14th day of December, 1886, the plaintiff was employed by the defendant to work in a saw-mill owned by the defendant, and that while engaged in the discharge of his duties under the employment, three of the boilers connected with the mill exploded, and he was greatly injured; that the explosion occurred by reason of the defectiveness and unsafe condition of the boilers, and each of them, each of them being old and rusted, and unfit for use, all of which was known to the defendant, who negligently and carelessly used them in his said business; that the defective and unsafe condition of the boilers was unknown to the plaintiff, and that the explosion and injury were not caused by the fault or negligence of the plaintiff.

The second paragraph of the complaint is much like the first, except that it avers that at the time of the explosion the defendant had leased the mill to one Joseph N. Morrow, to be operated by him in sawing for the defendant; that as a part of the mill, and embraced in the lease, were three boilers, and that at that time they were defective and unfit for use as such, in this, the iron of which they were made was old, rusted, rotten and leaky, had lost its elasticity, and was unable to withstand the pressure of steam, and the use of said boilers for said reason was necessarily dangerous, and the said condition was known to the defendant at the time of said lease.

The appellee answered in three paragraphs, but as the first paragraph is a general denial, and the appellant can not as-

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sail the sufficiency of the third paragraph in this court for the first time (*City of Evansville v. Martin*, 103 Ind. 206), we need only refer to the second paragraph, the sufficiency of which was tested by a demurrer in the trial court.

The second paragraph was pleaded in bar of both paragraphs of complaint.

After admitting his ownership of the mill, and the lease of the mill, boilers and machinery to Joseph N. Morrow, it avers that Morrow was to keep the mill and machinery in good repair, and that he was to have the absolute control thereof without interference on the part of the defendant; that he was to employ, discharge and pay all hands or servants, pay the entire expense of running the mill; that, so far as the boilers, engines and motive power of the mill were concerned, they belonged absolutely to said Morrow under said lease, and were under his control for himself, and not for the defendant; that, under said contract, the defendant was to put said mill and machinery in good repair, to the approval of Morrow, who was a practical saw-mill man of large experience in such matters, before he took possession; that defendant did so put said mill and machinery in repair to the approval of said Morrow, who, on the 20th day of November, 1886, took absolute and sole possession thereof, and "that said machinery and boilers were in good repair at the time of said lease, and had been used for a long time prior thereto by the defendant, and after said leasing the said Morrow used said boilers and machinery, and they were in a safe and reasonable condition at the time of said explosion."

It is contended by the appellant that the court erred in overruling the demurrer to this paragraph on account of its failure to fully negative the allegations of the complaint respecting the condition of the boiler, and iron of which it was constructed. The first paragraph of the complaint says of the boilers, that at the time of the injury, "each of them being old and rusted, and unfit for use;" and the second paragraph, that they were "defective and unfit for use as

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such, in this, the iron of which they were made was old, rusted, rotten, and leaky ; that it had lost its elasticity, and was unable to withstand the pressure of steam.”

We are satisfied that the answer is not subject to demurrer for failure to negative the material allegations of the complaint.

It is not essential that pleadings in actions for negligence should, to be good on demurrer, specify with any great degree of particularity the elements entering into the causes of action, or defence ; if the adverse party desires a more particular statement, a motion is the appropriate method of procedure. The answer avers that the boilers were in good repair when the mill was leased to Morrow. This is an allegation of a fact, and not a mere conclusion, and is necessarily inconsistent with the charges made in the complaint.

The next objection to the sufficiency of this answer is best stated in two citations from appellant's brief, viz.: “A steam engine out of repair, and in an unsafe condition, is a nuisance.” *Wood Nuisances*, 151. And “that it is no answer to a complaint alleging the existence of such nuisance to say that the owner had parted with the control of the nuisance under a contract with the lessee to make repairs ; and especially is this true when, as in this case, the owner shows that only the machinery was surrendered to another to be operated for the owner.”

That a steam engine so out of repair as to be in an unsafe condition when in use, is a nuisance is unquestionably true ; but as the demurrer admits the allegation of the answer, that the machinery and boilers were in good repair at the time of the making of the lease, to be true, it does not follow that that proposition is decisive of this case.

In discussing the sufficiency of the answer it must be assumed that the boilers were in good repair at the time they were leased by the appellee to Morrow, and that by the terms of the lease Morrow was to keep them in repair during the ex-

Deller *v.* Hofferberth.

istence of his lease. With reference to this state of facts the law is laid down in 2 Shearman & Redfield Neg., section 708, as follows: "An owner of property, either real or personal, who lets or lends it, without agreeing to make repairs thereon, and who transfers the entire possession and control of the property to the hirer, is not responsible for defects subsequently arising therein, either to the tenant or to third persons, even though the premises be in such a condition that they will naturally become a nuisance if the tenant fails to repair as he has covenanted."

In *Purcell v. English*, 86 Ind. 34 (40), this court, speaking of the liability of a landlord says, "Another author says: 'An owner being out of possession and not bound to repair, is not liable in this action' (i. e., for nuisance) 'for injuries received in consequence of his neglect to repair.' " Wharton Neg., section 817. In still another work it is said, in speaking of the landlord's liability: "Nor, in the absence of a covenant to repair, is he liable for injury resulting from the faulty construction or condition of the premises, the control over which is in the hands of a tenant, either to the tenant or third persons." Wood Land. and Ten., section 384; 1 Thompson Neg. 323.

In *Union Brass Mfg. Co. v. Lindsay*, 10 Ill. App. 583, it was held that the burden of proof is upon the plaintiff to show that the defect which causes the injury existed at the time of the making of the lease. A well considered case upon this subject is found in *Shindelbeck v. Moon*, 32 Ohio St. 264, in which the court held that the absence of an agreement on the part of the landlord to keep the premises in repair, he is not liable for injuries arising from a defective condition of the premises, when the defect arises during the continuance of the lease, although it is admitted that if a nuisance existed at the time of the demise, or in the nature of things become so by its use, he would be liable.

Each of the cases cited by the appellant recognizes this distinction, and many of them support the answer.

Farley v. The State.

In *Helwig v. Jordan*, 53 Ind. 21, the owner erected a kiln and leased it for a purpose that he knew would be dangerous. In *House v. Metcalf*, 27 Conn. 631, the wheel which caused the injury sued for, was found to be in the same condition at the time when the lease was made that it was at the time of the accident. The cases of *Prentiss v. Wood*, 132 Mass. 486, and *Jackman v. Arlington Mills*, 137 Mass. 277, were for injuries caused by continuing nuisances.

The conclusion we have arrived at is, that the court did not err in overruling the demurrer to the second paragraph of the answer.

By the fourth clause in the assignment of error, it is claimed that the court erred in overruling the motion for a new trial.

The only question discussed in appellant's brief, under this assignment of error, relates to the instructions given by the court to the jury.

No exceptions were taken or reserved to the giving of any of the instructions; but we have examined them and find that the court submitted the cause to the jury in accordance with the principles of law above enunciated.

Judgment affirmed.

Filed March 13, 1891.

137	419
128	196
127	419
155	270

No. 15,990.

FARLEY v. THE STATE.

CRIMINAL LAW.—Burglary.—Value of Goods Stolen.—Evidence.—On an indictment for burglary with intent to steal it is not error to admit proof of the value of the goods stolen, though such proof is unnecessary.

SAME.—Instruction.—Presumption of Innocence.—It is error to refuse the request of the defendant for an instruction that the presumption of innocence prevails throughout the trial, and that it is the duty of the jury, if possible, to reconcile the evidence with this presumption.

From the Hamilton Circuit Court.

Farley v. The State.

D. W. Patty and W. R. Fertig, for appellant.

A. G. Smith, Attorney General, *S. D. Stuart*, Prosecuting Attorney, and *J. F. Neal*, for the State.

OLDS, C. J.—This is a prosecution against the appellant by affidavit and information charging him with the crime of burglary.

There was a trial, resulting in a verdict of guilty, and the sentence of the appellant to five years' imprisonment. Various questions are properly presented by the record.

The first alleged error complained of and discussed is that the court permitted the State to prove, over the objection of the appellant, the value of the goods taken from the building.

The affidavit and information properly charged the breaking and entering of a storehouse with intent to steal, take and carry away divers goods, etc., though it charged no value of the goods. There is no available error in the admission of this testimony. It was necessary to show that the breaking and entering was done with intent to commit the particular felony charged, and it was proper to prove that the larceny was actually committed. While not necessary to prove the value of the goods stolen, yet it was not error to admit proof of their value.

The appellant asked the court to give certain instructions, which were refused and exceptions reserved.

The sixth instruction asked and refused is as follows:

“Sixth. The defendant is presumed to be innocent until proven guilty beyond a reasonable doubt, and this presumption prevails until the close of the trial, and you should weigh the evidence in the light of this presumption, and it should be your endeavor to reconcile all the evidence with this presumption of innocence, if you can.”

The court gave general instructions to the effect that the defendant is presumed to be innocent until proven guilty beyond a reasonable doubt, but no instruction was given

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embracing the principle stated in the sixth instruction asked, to the effect that the presumption of innocence prevails throughout the trial, and that it was the duty of the jury to reconcile the evidence upon the theory of the defendant's innocence, if they could do so.

It is a well settled principle in criminal law that the defendant enters upon the trial clothed with the presumption of innocence, and that this presumption remains with the defendant throughout the trial, and it is the duty of the jury, if it can be consistently done, to reconcile the evidence upon the theory that the defendant is innocent; but if this can not be done, and the evidence so strongly tends to establish the guilt of the defendant as to remove all reasonable doubt of his guilt, then it is the duty of the jury to convict.

When the court is requested at the proper time to so instruct the jury to this effect, it is the duty of the court to do so.

The sixth instruction is a proper enunciation of the law, and should have been given, and the court erred in refusing to do so.

In 1 Bishop Criminal Procedure, section 1104, it is said: "As we have already seen, the burden of proof is with the prosecuting power, not only when the trial begins, but throughout; for the presumption of innocence, which makes it so at first, keeps it so to the end." See *Castle v. State*, 75 Ind. 146; *Aszman v. State*, 123 Ind. 347.

For the error in refusing to give this instruction the judgment must be reversed.

The other questions presented in the case may not arise on a re-trial of the cause, and hence we do not pass upon them.

Judgment reversed, with instructions to sustain the appellant's motion for a new trial.

The clerk will issue the proper notice for the return of the prisoner.

Filed March 13, 1891.

Loesnitz v. Seelinger, Treasurer, et al.

197	492
128	76
197	428
132	252
188	91
127	422
137	382
137	398
127	422
146	106
137	422
185	488

No 15,183.

LOESNITZ v. SEELINGER, TREASURER, ET AL.

COUNTY COMMISSIONERS.—*Verbal Call for Special Session.*—Oral notice given by the county auditor to the board of county commissioners of a special session is sufficient.

SAME.—*Powers at Special Session.*—*Free Gravel Road.*—Where the board of county commissioners are lawfully convened in special session, or where they are lawfully in special session for the transaction of other business, they are authorized, without previous notice to any party interested, to act upon a petition then presented for the establishment of a free gravel road, and to act in all matters relating to the establishment and the construction thereof.

SAME.—*Session Unauthorized.*—*Acts Void.*—Any act performed by a board of county commissioners at a session held without authority of law is void.

COURTS.—*Lapse of Term.*—*Inferior Court.*—*Failure to Meet.*—A failure of a court of inferior jurisdiction to meet at the time and place fixed by law for its meeting, will, ordinarily, in the absence of a controlling statute, result in a lapse of that particular term.

SAME.—*Failure to Meet on Day Adjourned to.*—A failure of a court to meet on the day to which it has adjourned will result in the lapse of the remainder of the term, unless there exists some statute which prevents it.

SAME.—*Board of County Commissioners Meeting with Board of Equalization.*—*Lapse of Term.*—The board of equalization of a county met at the time required by statute, which was the day designated by law for the board of county commissioners to meet, but there was nothing in the record to show that there had been such a meeting of the board of equalization, except a recitation in the board of county commissioners' record of the following day to the effect that the board of equalization having adjourned the commissioners convened on such following day.

Held, that the presumption was that the board of commissioners met with the board of equalization upon the day it was required to convene, and made a record of such meeting; that the board of commissioners organized as a board of commissioners on that day (for the law required them to act as a board of commissioners when sitting with the board of equalization, and not as individuals), and that having so organized as such a board on the first day of the term, they were lawfully in session as a board of county commissioners upon the second day of their term.

GRAVEL ROAD.—*Assessment in Part Valid.*—*Injunction.*—If any part of an assessment for a free gravel road made against the land of an owner seeking to enjoin its collection is valid, he can not have an injunction until he has paid the part that is valid.

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SAME.—*Assessments are Several.*—*Judgment in Favor of One Land-Owner does not Aid Another.*—Assessments for the purpose of building a free gravel road are several and not joint; and the fact that some of the parties whose lands have been assessed for such improvement have procured a decree declaring the assessments, as to them, void, does not affect those who have procured no such a decree.

SAME.—*Part of Assessment Illegal.*—*Collateral Attack.*—*Rule as to Tax Illegal in Part does not Apply.*—The fact that a part of an assessment for a free gravel road is illegal does not render such assessment void, although the illegal can not be separated from the legal part; and such assessments can not be collaterally attacked, the remedy being by appeal. The rule applicable to a tax illegal in part and inseparably connected with the part that is legal, does not apply to such an assessment.

SAME.—*Contract for Construction in Part Illegal.*—The fact that a contract for the construction of a free gravel road is in part illegal will not render the assessments void, nor will the fact that the cost of the work exceeds the estimates, render the assessments, within the estimate, void.

SAME.—*Purchaser of Bonds not Responsible for Proper Application of Funds thus Raised.*—Assessments not being made to pay off the contractor, but to pay off the bonds issued to raise money to pay him, many objections that might otherwise be raised to the contractor's collecting such assessments can not be made when the county seeks to collect them. The purchasers of such bonds are not responsible for the proper application of the funds raised by the sale of the bonds.

SAME.—*Effect of Judgment Approving Report of Assessment of Benefits*—The order of the board of commissioners approving and confirming the report of the assessment of benefits and damages has the force and effect of a judgment against the owner of the land who has been properly notified, in so far as it affects the land, as much so as any other judgment of competent jurisdiction.

JUDGMENT.—*Collateral Attack.*—*When no Appeal Lies.*—*Inferior Court.*—The rule which renders the judgments of a court of competent jurisdiction impervious to collateral attack, applies as well where no appeal lies as to cases where appeals are allowable, even to the judgments of a board of county commissioners.

From the Ripley Circuit Court.

A. Stockinger, C. K. Paget, J. B. Rebuck, C. H. Wilson
and *J. L. Benham*, for appellants.

W. G. Holland, for appellees.

COFFEY, J.—The complaint in this case consists of two paragraphs, to each of which the circuit court sustained a

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demurrer, and thereupon the appellees had judgment for costs. The assignment of error calls in question the correctness of this ruling. Each paragraph seeks to obtain a decree enjoining the collection of an assessment made against the land of the appellant to aid in the construction of a free gravel road, and each proceeds upon the theory that the proceedings of the board of commissioners, resulting in the assessment, are void.

In the first paragraph it is alleged that the board of commissioners, at the time of making the preliminary order in the proceeding, was called in extra session by the verbal order of the auditor of the county in the month of April, 1884; that it did not meet on the first Monday of June, 1884, as required by law, but met on the Tuesday following the said first Monday, being the 3d day of June; that the term could not exceed nine days, and that the report of the viewers was filed and approved on the 12th day of June, 1884; that said board met in special session on the verbal call of the auditor, on the 12th day of March, 1885, and while so in special session, on the 20th day of that month, appointed the committee to apportion the benefits received from the construction of the free gravel road for which appellant's land was assessed; that the estimated cost to make said improvement was the sum of \$14,622, and that the board of commissioners let the contract for said work at the sum of \$13,616, and in addition thereto agreed to pay two dollars per yard for all retaining walls necessary on said road; that the retaining walls necessary to be made were fifteen hundred yards amounting to the sum of \$3,000; that on the verbal call of the auditor said board again met on the 17th day of December, 1885, and on the 19th day of the month received and approved the report of the committee to apportion the benefits; that at least one-half of the land assessed to pay for said work is so imperfectly described as to be incapable of identification.

The second paragraph, in addition to many of the allega-

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tions above set out, alleges that the contract for the retaining walls on said free gravel road was let privately, without bids and without competition, at a price largely in excess of the actual value or necessary cost of the work; that the amount of benefits to be received from said work was never ascertained by any committee or person having authority so to do; that the actual benefits do not exceed \$7,000, and that the cost of said improvement exceeds the benefits in the sum of \$7,600; that certain of the parties whose lands are assessed for the construction of said improvement brought their suit in the Ripley Circuit Court to enjoin the collection of said assessments, in which such proceedings were had that said court adjudged that the board of commissioners had no jurisdiction over the subject-matter or over the persons of said parties in the proceedings to make said improvements, and entered a decree enjoining the appellees in this case from collecting the assessments as to them, which decree is in full force, unappealed and unreversed; that said board unlawfully and unjustly ordered and contracted for the construction of three bridges on said road, one of the probable cost of \$6,000, one of the probable cost of \$1,000, and one of the probable cost of \$800, the cost of which bridges went into and constitutes a part of the assessments against the land within two miles of said road, and is part of the assessment against the land of the appellant; that the cost of said bridges is so commingled with the legitimate cost of the construction of said road that it can not be separated therefrom; that the bonds issued for the construction of said road were sold in the month of June, 1884, for cash at their face value before the work done on said road exceeded the sum of \$600; that the money derived from the sale of said bonds was paid into the county treasury and has since been squandered in useless litigation and otherwise, without the completion of said improvement, and that the work on said improvement has never been completed, nor is any attempt being made to complete the same, and that said road

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is in worse condition for travel than before work thereon was commenced.

It is contended by the appellant:

First. That the meeting of the board of commissioners, in special session, under the verbal call of the auditor of the county, was illegal, and that any action taken by such board while thus in session is void.

Second. That the board of commissioners can act upon a gravel-road petition only when in regular session.

Third. That by a failure of the board of commissioners to meet on the first Monday of June, 1884, the June term of the court lapsed, and that they could not, therefore, meet and hold the June term, and that all acts of the board while pretending to hold the June term are void.

Fourth. That the proceedings of the board of commissioners are void because the contract for the retaining walls was let without bids therefor having been previously received.

Fifth. That the proceedings of the board of commissioners are void because the cost of constructing the road exceeds the benefits.

Sixth. That the proceedings of the board of commissioners are void because they undertook to build bridges costing more than seventy-five dollars by special tax assessed against a part only of the citizens of the county.

Seventh. That the judgment of the Ripley Circuit Court declaring the assessments for the improvement of the road void as to a part of those whose lands are assessed, avoids the assessments as to all.

It has been held by this court that an oral notice given by the county auditor to the board of county commissioners of a special session is sufficient, and when so convened, or when they are lawfully in special session for the transaction of other business, they are authorized, without previous notice to any party interested, to act upon a petition then pre-

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sented for the establishment of a gravel road. *White v. Fleming*, 114 Ind. 560.

We have no reason to doubt the correctness of the conclusion reached in the case here cited, and for that reason we follow it in this case.

That the board of commissioners in this State have the power to act in all matters relating to the establishment and construction of free gravel roads, when in special session, is no longer an open question. *White v. Fleming, supra*; *Anderson v. Claman*, 123 Ind. 471; *Stipp v. Claman*, 123 Ind. 532; *Fleener v. Claman*, 126 Ind. 166.

The third contention of the appellant presents a question of much difficulty, and one that has not, to our knowledge, been passed upon by this court. It may be conceded, however, that if the failure of the board of commissioners to meet on the first Monday in June resulted in a lapse of the June term, such board could not meet on Tuesday following and hold its regular session.

Such a meeting would be without authority of law, and any acts performed by the board while so acting would be absolutely void. *Doss v. Waggoner*, 3 Texas, 515; *Norwood v. Kenfield*, 34 Cal. 329; *Wicks v. Ludwig*, 9 Cal. 173; *Hernandez v. James*, 23 La. Ann. 483; *Ex parte Osborn*, 24 Ark. 479; *Brumley v. State*, 20 Ark. 77; *Garlick v. Dunn*, 42 Ala. 404; *People v. Bradwell*, 2 Cowen, 445; *People v. Sanchez*, 24 Cal. 17.

It is also undoubtedly true that where the law fixes the time and place for holding a court of inferior jurisdiction, the failure to meet at the time and place designated in the law will, ordinarily, in the absence of a controlling statute, result in a lapse of that particular term of court. *People v. Bradwell, supra*; *People v. Sullivan*, 2 N. Y. Supp. 135; *May v. People*, 8 Col. 210; *Garza v. State*, 12 Texas App. 261; *Langhorne v. Waller*, 76 Va. 213.

Following this general rule it has been held that where the court adjourns from one day to another given day, a

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failure to meet on the day to which the court is adjourned will result in a lapse of the remainder of the term, unless there exist some statute which prevents such lapse. *Sullivan v. People, supra*; *Langhorne v. Waller, supra*.

An examination of all the authorities upon the subject will disclose the fact that the rule is the result of the construction placed upon the statutes of the several States fixing the time and place of holding court, and is, in most cases, regarded as being somewhat technical. Regarded in that light the several States in the Union, by proper legislation, have guarded against the consequences of the failure of the judge to appear on the first day of the term by providing that certain designated officers shall adjourn the court from day to day, for a given period. So reluctant have the courts been to holding that a failure of the judge to appear will work a lapse of the term that it has been held the term would not lapse where the designated officers failed to adjourn the court from day to day, as provided by law. *May v. People, supra*; *Thomas v. Fogarty*, 19 Cal. 644.

In the light of these several authorities we proceed to examine the case before us.

On Tuesday, the 3d day of June, 1884, the board of commissioners of Ripley county made the following record:

“ Commissioners Court, June term, 1884: June 3, 1884. The board of equalization having adjourned, commissioners court convened, with John W. Neighbert as president, John H. Ellers and Phillip Ensmiher, commissioners, and Nicholas Comet, auditor, acting clerk.”

Section 6397, R. S. 1881, provides that there shall be an annual board of equalization, which shall be composed of the board of county commissioners and four freeholders, selected from different parts of the county, to be appointed by the judge of the circuit court.

Section 6398 provides that the board of equalization shall meet at the room of the county commissioners, in the court-house of each county, on the first Monday in June, annually.

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It is not claimed that the board of commissioners of Ripley county did not meet with the board of equalization on the first Monday of June, 1884. Indeed, it affirmatively appears that the board of equalization had been in session, and, as public officers are presumed to have done their duty, we must presume they met at the time designated by law. They could not meet without the board of commissioners, for that body constituted an indispensable part of such board. Nor could the board of commissioners act as a part of the board of equalization without first organizing as a board of commissioners, for they do not act individually but as a body.

Under the showing made by the complaint, we must presume, therefore, that the board of commissioners of Ripley county organized on the first Monday of June, 1884, for the purpose of taking part with the board of equalization, and that they were in session at their room, in the court-house of the county, for that purpose. As to what record they made upon that subject we are not informed, but again we must presume they did their duty and made the proper record. Having organized as a board of commissioners, on the first Monday of June, for the purpose of taking part with the board of equalization, we think they might meet again on the Tuesday following and organize for the purpose of transacting general business, and that their failure to enter of record their organization on Monday did not result in a lapse of the June term.

Having reached this conclusion, it follows that the action of the board, while thus in regular session, in approving the report of the viewers, was valid.

The commissioners then having acquired jurisdiction over the subject-matter and over the persons to be affected by the improvement sought to be made, it remains to inquire whether the other matters of which complaint is made are of such a character as to render the whole assessments invalid and to entitle the appellant to an injunction against the collection

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of the same. Unless the whole assessment is void it will not be claimed that an action for injunction can be maintained, for he who seeks equity must first do equity. If any part of the assessment made against the appellant's land is valid he can not have an injunction until he has paid such part as is valid. *Ricketts v. Spraker*, 77 Ind. 371.

In a further consideration of the objections urged against this assessment we must, also, keep in mind the familiar rule that where a court of competent jurisdiction acquires jurisdiction over both the subject-matter and the persons to be affected, its rulings however erroneous are not, generally, void.

We do not think the manner of letting the contract for the work in making the improvement in controversy, renders the whole assessment void. It can not be said that because the contract for making the retaining walls was illegal, assuming it to be so, would deprive the contractors of the right to pay for grading and macadamizing the road proper; nor would the fact that the cost of the work exceeded the estimates render the assessments, within the estimate, void.

The question as to whether the contractor would be able to collect his full pay is a question entirely different from the one as to whether he would be entitled to receive a sum equal to the estimated cost of the work.

Assuming, also, without deciding, that it was error to include in the estimated cost of the work, bridges costing over seventy-five dollars, yet we think it was merely an error which does not render the entire assessment void.

In considering these questions it is not improper to keep in mind the fact that the assessments are not now made to pay the contractor for his work, nor to pay for the improvement, but they are made for the benefit of the holders of the bonds issued by the board of commissioners to raise money to pay for the improvement.

The contractor and the cost of the improvement are paid by the board of commissioners out of a fund raised

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from the sale of the bonds, and the assessments are collected to pay the purchasers of the bonds. Certainly it will not be contended that the purchasers of the bonds issued by the board are to be held responsible for the proper application of funds to the purpose for which they are raised. Such a construction of the statute would wholly defeat the object of the law, for if the purchaser of such bonds was compelled to take the hazard of losing his money in the event the funds were wasted or misapplied, he would not purchase. For these reasons, among many others that could be given, we think that mere error in the board in the matter of letting the contract, in the matter of making the estimates, or even in recklessness, or wanton or inexcusable negligence in the use of the funds, when raised by the sale of the bonds, can not affect the validity of the assessments.

Nor do we think it is shown that there has been a judgment of the Ripley Circuit Court which relieves appellant from the assessment set up in his complaint. The assessments for the purpose of building free gravel roads are several and not joint. *Fleener v. Claman, supra.*

The fact that some of the parties whose lands have been assessed for this improvement have procured a decree declaring such assessments, as to them, void, does not help those who have procured no such decree.

We do not think the circuit court erred in sustaining the demurrer to the complaint before us.

Judgment affirmed.

BERKSHIRE, J., took no part in the decision of this cause.

Filed Dec. 11, 1890.

ON PETITION FOR A REHEARING.

A petition for a rehearing, supported by an earnest argument, has been filed in this case, in which it is insisted that this court erred in the opinion heretofore rendered, in this:

First. In holding that an action will not lie to enjoin the

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collection of an illegal assessment to aid in the construction of a free gravel road until the legal assessments have been paid, where the legal and illegal tax has been so commingled as that they can not be separated.

Second. In failing to decide that an appeal will not lie from a proceeding to establish and construct a free gravel road.

The contention of the appellant is that the viewers appointed by the board of commissioners to view the road in controversy, and estimate the expense of performing the work petitioned for, in estimating such expense took into consideration the construction of certain bridges which could not be constructed under the law providing for free turnpike roads, and that the viewers appointed to apportion the estimated costs of such improvement included in the amount apportioned against the appellant's land the cost of constructing such bridges, and that the cost of constructing the bridges is so blended and commingled with the legitimate expenses that it can not be ascertained and separated. It is contended that by reason of the facts above stated the whole assessment is void.

When the opinion was prepared in this case we did not think, nor do we think now, that the rules applicable to an ordinary tax had any application to cases of the class to which this belongs.

Under the provisions of section 5092, R. S. 1881, the board of commissioners are required to appoint three disinterested freeholders of the county, whose duty it is to make a report to said board at its next regular session, containing, among other things, an estimate of the costs of the improvement sought to be made. By the provisions of section 5096, the board are further required to appoint three other disinterested freeholders of the county, whose duty it is, upon actual view, to apportion the estimated expenses of the improvement upon the real property embraced in the order for the improvement, according to the benefits derived therefrom, and to make re-

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port thereof to the county auditor. After the filing of such report the auditor is required to notify those interested. It is made the duty of the board of commissioners, after such notice has been given, to hear any objections that may be made thereto, and if no sufficient reason is shown why it should not do so, they are required to approve and confirm the report, and order the amount due from each tract of land to be assessed against the same.

The order of the board of commissioners approving and confirming the report has the force and effect of a judgment against the owner of the land thus notified, in so far as it affects the land. This judgment is as binding upon the parties as the judgment of any other court of competent jurisdiction upon the finding of the court or the verdict of a jury. If any owner of land assessed has any valid objection to the assessment it is his duty to avail himself of such objection, when brought into court for that purpose, and if he fails to do so the judgment estops him from making such objection in any collateral proceeding like the one before us. *Million v. Board, etc.*, 89 Ind. 5; *Osborn v. Sutton*, 108 Ind. 443; *White v. Fleming*, 114 Ind. 560.

It will thus be seen that the authorities applicable to an ordinary tax, levied without notice to the parties to be affected thereby, have no application to this case.

As no effort was made to appeal the proceedings, resulting in the assessment which the appellant seeks to enjoin, we do not think the question as to whether an appeal does or does not lie from such a proceeding is involved in this case. Nor are we able to perceive how that question can affect the controversy here waged. Assuming that no appeal lies from such proceeding, as contended by the appellant, it follows that the Legislature has made the findings and judgments of the board of commissioners, in matters of this kind, conclusive. The rule which renders the judgments of a court of competent jurisdiction impervious to collateral

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attacks, applies as well where there is no appeal as to cases where appeals are allowable. This being so, the question as to whether an appeal lies from a proceeding to establish a free gravel road is wholly immaterial where judgments of the board of commissioners are attacked collaterally. We do not think we erred in the matter of which complaint is made.

Petition overruled.

Filed March 13, 1891.

No. 14,545.

127 434
151 510

POUDER v. CATTERSON, RECEIVER.

RECEIVER.—*Action by Against Tenant Wrongfully Holding Over.*—*Leave of Court.*—*Pleading.*—*Complaint.*—Where one holding under a receiver as lessee or tenant refuses to surrender, the receiver is entitled to maintain an action to recover possession in his own name without an order of court, and the complaint need not allege that the receiver has been authorized by the court to bring the action.

SAME.—*Title.*—*Estoppel.*—One who has taken a lease from and become the tenant of a receiver, is estopped to deny the title of his lessor while he remains in possession under the lease.

From the Marion Superior Court.

W. D. Bynum and A. T. Beck, for appellant.

F. Knefler, J. S. Berryhill and J. B. Elam, for appellee.

PER CURIAM.—This opinion, in which we all concur, was prepared for the court by the late Judge Mitchell, and expresses the views and judgment of the court.

It appears that Robert Catterson was duly appointed receiver of the rents and profits of certain real estate in a suit by Warren Tate against Milton Pouder and others to foreclose a mortgage.

The receiver took possession of the land mortgaged and

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leased it to the appellant, who took possession and paid rent. Subsequently the receiver brought this action against the appellant to recover possession, alleging that by the terms of the lease the tenancy had expired, and that the defendant unlawfully held over and refused to surrender possession, to the damage, etc.

It is contended that the complaint is fatally defective in that it contains no averment that the receiver has been authorized by the court, under whose appointment he is acting, to institute the action.

It is undoubtedly a correct special proposition that, in the absence of authority derived from the statute or from the court ordering his appointment, a receiver has no power to sue in his own name, and that when his authority is derived from the order of the court, that fact must appear by suitable averments in the complaint. *Garver v. Kent*, 70 Ind. 428. The reason is that the legal title to choses in action, or other property which he is authorized to reduce to possession, is ordinarily not transferred to the receiver, but remains in the owner, in whose name suit must be brought unless the statute or the order of the court authorizes the receiver to proceed in his own name. Neither the reason nor the rule controls in case a receiver brings suit upon a contract made with him, or upon an obligation due to him as such. *Singerly v. Fox*, 75 Pa. St. 112.

A receiver, being nothing more than the instrument used by the court in accomplishing its purpose or carrying into effect its decree, must be presumed to have the power to take all such steps as are essential to enforce the performance of contracts or agreements made with him in the course of his receivership. It can not be that one who is appointed a receiver to collect rents has no implied authority to compel payment from one to whom he has leased the premises under the order of the court, or to recover possession of the leasehold in case his tenant holding under a lease made with him refuses to surrender.

Newhouse v. Morgan.

Accordingly, it is laid down as an established rule that "after the tenants have attorned to the receiver, and so created a tenancy, as between them, the receiver may also distrain, in his own name, for rent accrued during such tenancy, without first obtaining an order so to do; but a distress for rent accrued before that time must be made in the name of the person who has the legal right to the rent." 2 Daniell Chan. Pr. 1748.

Where property has been wrongfully taken from the possession of a receiver, or where one holding under him as lessee or tenant, refuses to surrender, he is entitled to maintain an action to recover possession in his own name without an order of the court. *Kehr v. Hall*, 117 Ind. 405.

One who has taken a lease from and become the tenant of a receiver, is estopped to deny the title of his lessor while he remains in possession under the lease.

What has been said determines all the questions involved, and leads to an affirmance of the judgment.

Judgment affirmed, with costs.

Filed Jan. 8, 1891; petition for a rehearing overruled March 14, 1891.

127 486
181 190

No. 14,536.

NEWHOUSE v. MORGAN.

MECHANIC'S LIEN.—Notice.—*Sufficiency of.*—A notice from a material man of his intention to hold a lien "for work and labor done and material furnished by me in the construction and erection of said house, which work and labor done and material furnished was done and furnished by me at your special instance and request," sufficiently shows that the material was furnished for the owner's building.

SAME.—A notice to the owner from a material man of his intention to hold a lien is sufficient, whether oral or written, if it puts the owner on his guard, and enables him to take steps to protect himself against loss.

From the Clinton Circuit Court.

Newhouse v. Morgan.

H. C. Sheridan, J. W. Merritt and J. Claybaugh, for appellant.

F. F. Moore, for appellee.

ELLIOTT, J.—The allegations of the appellee's complaint are, in substance, these: That on the 30th day of September, 1886, the appellant entered into a contract with William Comley, wherein the latter undertook to erect a dwelling-house upon a lot owned by the former; that on the same day the appellee contracted with Comley to furnish the material for the wood-work of the house; that the appellee did furnish materials under the contract to the value of four hundred and twenty-two dollars; that at the time of furnishing the materials he notified the appellant that he was furnishing them to Comley, and that at the time such notice was given the appellant was indebted to Comley in a sum equal to the appellee's claim; that Comley gave the appellee an order on the appellant for part of the amount due the appellee, but said order was not accepted or paid. It is further alleged that the appellee filed a notice of his intention to hold a lien on the property, and a copy of the notice is filed with the complaint as an exhibit.

We shall consider the objection made to the complaint by the appellant and no other, so that our decision is authoritative upon no other question. The appellant's counsel thus present their point: "The only question presented by the appellant in the court below upon the demurrer was as to the sufficiency of the notice. The court will observe that the notice, in reference to the furnishing of material, is as follows: 'For work and labor done and material furnished by me in the construction and erection of said house, which work and labor done and material furnished was done and furnished by me at your special instance and request.' The complaint is for material furnished to the contractor upon a contract to which the complaint itself shows the owner was not a party, and the appellant insists that a notice is insuffi-

Newhouse v. Morgan.

cient unless the same shows that the material was furnished to the contractor, at his instance, for use in the building of the appellant." Granting that this language is sufficient to present an objection, and granting that the objection presented is that the notice does not show that the material was furnished for use in the building of the appellant, we nevertheless think it clear that the point attempted to be made is without strength. All the recitals of the notice must be taken into consideration, and when this is done it fully appears that the material was furnished for the appellant's building. *Feeley v. Searight*, 113 Ind. 316. The language employed by the appellant's counsel in stating their point is ambiguous, and it is difficult to determine what the precise point intended to be made is; but yielding them the benefit of all doubt, and stretching to the widest extent the rule respecting the certainty and fullness with which a point must be presented in a brief, we can still find no sufficient reason for giving force to the objection counsel assume that they have interposed to the complaint.

It is contended that the finding of the trial court is not sustained by the evidence; but we are unable to concur with counsel in this view. It is settled by our decisions that a verbal notice to the owner from a material man is sufficient. *Albrecht v. C. C. Foster, etc.*, *Cb.*, 126 Ind. 318; *Feeley v. Searight, supra*; *Vinton v. Builders, etc., Ass'n*, 109 Ind. 351. But while a verbal notice is sufficient it must be such as will fairly inform the owner that the material man intends to hold a lien; it is not sufficient for the latter to inform the owner in a mere casual conversation that he is furnishing material; he must, at least, give the owner such reasonable notice as will put him on his guard, and enable him to take measures to protect himself from loss. *Feeley v. Searight, supra*; *Caylor v. Thorn*, 125 Ind. 201. It is, however, not essential that the notice should be given in any precise form of words; it is enough if it conveys to the owner information that the material man intends to hold a lien for his claim.

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Neeley v. Searight, supra; Albrecht v. C. C. Foster, etc., Co., supra. In the case before us there is evidence that the appellant was notified that the material man intended to take a lien upon the property; hence, the notice was sufficient to put the owner upon his guard, and to suggest to him that he would do well to take steps to protect himself against the lien.

Judgment affirmed.

Filed Jan. 18, 1891; petition for a rehearing overruled March 14, 1891.

No. 14,630.

POTTER v. McCORMACK ET AL.

127	439
140	350
127	439
152	491

PRACTICE.—Motions in Arrest of Judgment and for a Venire de Novo.—When Must be Made.—A motion in arrest of judgment and a motion for a *venire de novo* must precede the rendition of the judgment, and can not be considered if not made until after judgment has been rendered.

SAME.—Defective Verdict.—A motion in arrest of judgment will not reach a defective verdict.

COUNTY COMMISSIONERS.—Highway.—Establishment of.—Appeal.—Questions Trial—Verdict.—On appeal to the circuit court from the county commissioners in highway cases, only such questions are for trial as were in issue before the commissioners, or, as may, by leave of court, be put in issue by amended pleadings, and if the verdict covers these matters it is sufficient.

From the Tippecanoe Circuit Court.

A. Rice and W. S. Potter, for appellant.

J. F. McHugh, for appellees.

McBRIDE, J.—This was a proceeding commenced before the board of commissioners of Tippecanoe county by the appellant for the establishment of a highway.

The appellant appeared and filed a remonstrance on the ground that the highway would not be of public utility.

Potter v. McCormack *et al.*

On motion of appellees his remonstrance was dismissed by the board of commissioners, who thereupon made an order establishing the highway. Appellant appealed to the circuit court, where, on leave granted, he filed an amended remonstrance, alleging, as in his original remonstrance, as the only ground of objection, that said proposed highway would not be of public utility. The cause was tried by a jury. The jury returned a general verdict for the appellees, the petitioners, and found that the proposed highway would be of public utility, giving a description of it, with its width, etc. Appellant then moved for a new trial. This motion was made on the 24th day of October, 1887, and on the 26th day of October the court overruled the motion and rendered judgment on the verdict for the appellees, establishing the highway, and for costs.

On the 27th day of October, 1887, appellant moved the court in arrest of judgment. This motion was overruled, and appellant moved the court for a *venire de novo*. This motion was also overruled. The appellant saved the several questions thus presented by proper exceptions.

The only questions presented to this court are that the court erred in overruling,

1. The motion in arrest of judgment, and,
2. The motion for a *venire de novo*.

These motions both came too late to be of any avail to appellant. A motion in arrest of judgment must precede the rendition of the judgment, and can not be considered if not made until after judgment has been rendered. *Hansher v. Hanshew*, 94 Ind. 208; *Brownlee v. Hare*, 64 Ind. 311.

This is also true of a motion for a *venire de novo*. Works Practice, section 974; *Shaw v. Merchants National Bank*, 60 Ind. 83.

Even if these motions had been made in proper time, they present no question upon which we would be justified in reversing the case. Appellant only seeks, by the motion in arrest of judgment, to attack the verdict, which, he insists,

Ashmead v. Reynolds *et al.*

is defective. A motion in arrest of judgment will not reach a defective verdict. Works Practice, section 1045; Buskirk Practice, p. 264; *Adamson v. Rose*, 30 Ind. 380; *Waugh v. Waugh*, 47 Ind. 580.

The motion for a *venire de novo*, made in season, will reach a defect of the character which appellant insists makes this verdict bad. Under the ruling of this court, in *Mathews v. Droud*, 114 Ind. 268, the verdict was sufficient. It is there held, that on appeal to the circuit court from the county commissioners in highway cases, only such questions are for trial as were in issue before the commissioners, or as may by leave of court be put in issue by amended pleadings, and if the verdict covers these matters, it is sufficient. Judged by the rule thus laid down, the verdict in this case is sufficient.

Judgment affirmed, with costs.

Filed March 14, 1891.

15,539.

ASHMEAD v. REYNOLDS ET AL.

DEED.—Of Insane Person.—Action to Set Aside.—Disaffirmance.—Pleading.

Complaint.—A complaint in an action by heirs to set aside the deed of their ancestor, on the ground that he was of unsound mind when the deed was executed to the defendant, which fails to allege the disaffirmance of the deed before the commencement of the suit, is demurrable. *Hull v. South*, 109 Ind. 315, and *Lange v. Dammier*, 119 Ind. 516, distinguished.

SAME.—Pleading.—An averment that the defendant, after the death of the ancestor, took possession of the land over the objection of the plaintiffs, is not a sufficient averment of disaffirmance, where the ground of objection is not shown.

From the Gibson Circuit Court.

M. W. Fields, J. W. Ewing, C. A. Buskirk and J. W. Brady, for appellant.

A. P. Twineham, W. D. Robinson and L. C. Embree, for appellees.

127	441
134	140
135	503
136	36
127	441
139	74
127	441
143	534
127	441
154	372
154	378
127	441
158	627

Ashmead *v.* Reynolds *et al.*

COFFEY, J.—This was an action by the appellees against the appellant for the partition of the lands described in the complaint, and to set aside a conveyance of said land, executed by Joseph H. Reynolds to the appellant.

The complaint consists of four paragraphs.

The first paragraph alleges, among other things, that the said Joseph H. Reynolds died intestate in August, 1888, the owner in fee of the land, and leaving as his only heirs at law the parties to this suit; that the said Joseph H. Reynolds at the time of his death was, and for more than two years prior thereto had been, a person of unsound mind, and wholly incapable of managing his own affairs; that the appellant, well knowing his condition, and fraudulently intending to cheat and defraud him out of his property, did, without any consideration, obtain from the said Joseph H. Reynolds a deed of conveyance for all said land on the 28th day of May, 1888.

The second paragraph of the complaint alleges that the land in controversy was conveyed by Joseph H. Reynolds to the appellant on the 28th day of May, 1888; that at the date of said conveyance, and for more than six months prior thereto, said Joseph H. Reynolds was more than eighty years old, sick and greatly enfeebled both in body and mind, and by reason thereof easily susceptible to the influence, arts and persuasions of others; that during said time the appellant, who was the nephew of the said Joseph H. Reynolds, well knowing his weak and enfeebled condition, and corruptly contriving and intending to profit thereby, and to defraud the said Reynolds out of said land, made frequent visits to him, and by means of continuous, persistent and undue persuasions, and undue, corrupt and overpowering influence, so wrought upon the mind and inclinations of the said Reynolds that on the said 28th day of May, 1888, he procured from him an agreement, whereby he agreed and undertook, without any consideration whatever at the time paid by the appellant, and without any agreement to pay any reasonable or adequate consideration therefor, to convey said land to

Ashmead *v.* Reynolds *et al.*

the appellant, and that pursuant to said agreement, and in consummation thereof, the said Reynolds did, on said day, convey the land to the appellant; that said land was of the value of nine thousand dollars; that by the means above set out the will and intent of the said Reynolds were overpowered and controlled to the extent that instead of acting in accordance with his own will and desire, he was wholly governed and controlled by the appellant; that after the death of the said Reynolds, and prior to the commencement of this action, the appellant, against the protest of the appellees, took exclusive possession of said land, and excluded the appellees therefrom, and frequently asserted that he was the owner thereof, and that the appellees had no interest therein; that said Reynolds departed this life intestate on the 18th day of August, 1888, leaving the parties to this suit as his only heirs at law.

The third paragraph of the complaint does not materially differ from the first, except that it alleges the deed therein described was procured by the appellant in the manner set out in the second paragraph.

The fourth paragraph of the complaint alleges that Reynolds was a person of unsound mind; that appellant procured from him a deed to the land in controversy without any consideration; that Reynolds died intestate on the 18th day of August, 1888, and that after his death the appellee took possession of said land and refused to permit the appellees to occupy any part thereof and declared that he had a deed to the same and was the owner thereof, and that the appellees had no interest therein.

A trial of the cause, by the court, resulted in a finding and judgment for the appellees.

The assignment of errors calls in question the correctness of the ruling of the circuit court in overruling a demurrer to each paragraph of the complaint, as well as the correctness of the decision in overruling a motion for a new trial.

The principal objection urged against the complaint is,

Ashmead v. Reynolds *et al.*

that it fails to allege a disaffirmance of the deed executed by Joseph H. Reynolds to the appellant before the commencement of this suit. This objection is well taken. It is too well settled in this State to admit of controversy that the executed contracts and deeds of a person of unsound mind, not under guardianship, are not void but only voidable. Before an action can be maintained to set aside such contracts or deeds they must be disaffirmed. The same rule prevails as to contracts and deeds obtained by fraud. *Nichol v. Thomas*, 53 Ind. 42; *Schuf v. Ransom*, 79 Ind. 458; *Fay v. Burditt*, 81 Ind. 433; *Musselman v. Cravens*, 47 Ind. 1; *Freed v. Brown*, 55 Ind. 310; *Wray v. Chandler*, 64 Ind. 146; *Hardenbrook v. Sherwood*, 72 Ind. 403; *Boyer v. Berryman*, 123 Ind. 451.

Before a party holding such contract or deed can be subjected to litigation, he must have an opportunity to correct the evil without costs. Something should be said, or some act done, whereby the party holding such deed or contract is distinctly given to understand that the party having the right to do so intends to disaffirm. It is the act of disaffirming which destroys a voidable contract or deed, and not the proceedings which may be taken to give force and effect to the disaffirmance after it has been made. *Potter v. Smith*, 36 Ind. 231; *Long v. Williams*, 74 Ind. 115.

It is contended by the appellees in this case that the allegation in the complaint, to the effect that the appellant, after the death of Joseph H. Reynolds, took possession of the land in dispute over the objection and protest of the appellees, amounts to an allegation that they disaffirmed the deed.

This allegation, however, is wholly omitted in the first paragraph of the complaint; nor do we think it amounts to a good allegation of disaffirmance in the other paragraphs.

The ground upon which the appellees objected and protested does not appear. Their objection and protest may have been upon other grounds than that they disaffirmed the deed of Joseph H. Reynolds, and the appellant may have

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had no notice that they intended to repudiate such deed. If he had no such notice he did not have the opportunity to reconvey, without costs, which the law confers.

The conclusion here reached is not in conflict with the cases of *Hull v. Louth*, 109 Ind. 315, and *Lange v. Dammier*, 119 Ind. 567.

In the case of *Hull v. Louth, supra*, Emma J. Taylor, who executed the conveyance involved, was brought into court by the plaintiff in the case. Her mental incapacity had been continuous, and the guardian was not appointed until after the suit had been commenced. There was, therefore, no one who could disaffirm the conveyance before the commencement of the suit.

Furthermore, it has always been held that where an insane person is brought into court, by suit, to enforce a contract made by him, he may, by his guardian, defend on the ground that he was insane at the time such contract was made. *Northwestern Mut. F. Ins. Co. v. Blankenship*, 94 Ind. 535; *Copenrath v. Kienby*, 83 Ind. 18; *Musselman v. Cravens, supra*.

All that is authoritatively decided relative to the question now before us, in the case of *Lange v. Dammier, supra*, is that a failure to allege in the complaint a disaffirmance is cured by verdict, and is not available on a motion in arrest of judgment.

In our opinion the circuit court erred in overruling the demurrer of the appellant to each paragraph of the complaint now before us.

Judgment reversed, with directions to sustain the demurrer to the complaint.

Filed Jan. 7, 1891; petition for a rehearing overruled March 14, 1891.

The City of Franklin v. Harter.

No. 14,900.

127	446
143	652
127	446
144	698
146	440
127	446
160	152
127	446
167	522

THE CITY OF FRANKLIN v. HARTER.

NEGLIGENCE.—*When Question of Law and when of Fact.*—Where an inference of negligence may, or may not, be reasonably drawn from admitted facts, the case is ordinarily for the jury under proper instructions, but where only one inference can be reasonably drawn from the facts the question of negligence is one of law for the court.

MUNICIPAL CORPORATION.—*Defective Sidewalk.*—*Action for Personal Injuries.* *Contributory Negligence.*—In an action for damages for injuries resulting from a fall into a cellar-way in defendant's sidewalk, the fact that plaintiff was blind does not authorize the conclusion that he was guilty of contributory negligence as against an averment that he was free from fault.

SAME.—*Safety of Streets.*—*Not Insurer of.*—A municipal corporation is not an insurer of the safety of its streets, and to charge it with liability for injuries resulting from defects in its streets it must be affirmatively shown that the municipality was guilty of negligence.

SAME.—*Negligence.*—*Question of Fact.*—It can not be adjudged as a pure matter of law that, irrespective of all questions of locality and surroundings, a municipal corporation is liable for an injury received by a person who falls into an opening made for a stairway where the entrance only is left open.

From the Johnson Circuit Court.

W. C. Thompson, J. C. McNutt, G. M. Overstreet, Sr., A. B. Hunter and J. Overstreet, for appellant.

F. S. Staff, R. M. Miller and H. Barnett, for appellee.

ELLIOTT, J.—The appellee recovered judgment against the appellant for injuries resulting from a fall into a cellar-way in one of the sidewalks of the appellant, which it is alleged was negligently suffered to remain without guards or warnings.

The objection urged against the complaint is that it does not show that the plaintiff was not guilty of contributory negligence. It does contain the usual general averment that the plaintiff was free from fault, and the specific allegations do not overcome the general averment. The fact that the plaintiff was blind does not, in itself, authorize the con-

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clusion, as against the direct and positive averment of the complaint, that he was guilty of contributory fault. It is only where the specific allegations clearly show that there was contributory negligence that the general averment is overthrown, and the specific allegations of the complaint before us do not show that the general averment is not true.

One of the instructions given by the trial court reads thus: "The city of Franklin has exclusive control of the streets and sidewalks within the corporate limits. It is conceded that the stairway referred to in the complaint has been as it now is since 1868. This is a sufficient time to charge the city with notice of its existence. It is conceded by the defendant that the stairway, with an iron railing upon the east and north, and open to the south, within the limits of the sidewalk adjoining the Hulsmann building, has been for a number of years as it now is. This state of facts charges the city of Franklin with liability to the plaintiff, and makes the city responsible to the plaintiff, Harter, for all the damages he has sustained by reason of falling into the stairway, that will be a full and adequate compensation for the damages he has sustained, unless he was, himself, guilty of negligence contributing to the injury."

It is evident that this instruction is not well drawn, and that it is justly subject to criticism on account of its confused and ill-expressed statements; but, waiving all criticism of such a nature, we shall consider it as if there were no verbal inaccuracies.

In so far as the instruction relates to the control of the municipality over its sidewalks it is unassailable, and its directions as to the duty of the municipality to take notice of the opening for the cellar are correct. But there are, however, errors in it of a very material character.

A municipal corporation is not an insurer of the safety of its streets, and to fasten a liability upon it for injuries resulting from defects in its streets it must be affirmatively shown that the municipality was guilty of negligence. The ques-

The City of Franklin *v.* Harter.

tion is always one of negligence, for, in no instance, can there be a recovery unless the corporation has failed to exercise ordinary care, skill or diligence to make its streets reasonably safe for passage.

As the question in cases where a municipal corporation is sought to be held liable for injuries caused by a defect in a street is one of negligence, it is seldom that the court can determine the question as one of law, for in by far the greater number of cases the question is a complex one, in which matters of law blend with matters of fact. In all such cases the duty of the court is to instruct the jury as to the law, and that of the jury is to determine whether, under the law as declared by the court, there is actually negligence. Nor does this general rule fail in all cases where the facts are undisputed, since the rule has long been settled in this State that where an inference of negligence may or may not be reasonably drawn from admitted facts, the case is ordinarily for the jury under proper instructions, but where only one inference can be reasonably drawn from the facts the question of negligence or no negligence may be determined by the court, as one of pure law. The rule as we have outlined it, is the law of this State and must be so accepted, notwithstanding expressions occasionally found in some of the cases which seem to indicate a different doctrine. It would overthrow a long line of cases to deny the rule, and it would also lead to the subversion of sound and salutary principles. In the old as well as in the recent cases the doctrine we here declare has been strongly and explicitly asserted, and to that doctrine we give an unwavering and unhesitating adherence, disapproving all statements which seem to deny its soundness. *Baltimore, etc., R. R. Co. v. Walborn, ante*, p. 142; *Rogers v. Leyden, ante*, p. 50, and authorities cited.

By the rule so often asserted the instruction under immediate mention must be tested, and if it will not bear the test it must be condemned. That it falls before the test we think

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is clear. It explicitly directs the jury that: "This state of facts charges the city of Franklin with liability to the plaintiff," thus confining the jury to the facts mentioned in the instruction. If the "state of facts" to which the jury are confined by the instruction does not, in itself, create a liability, it is impossible to rescue the instruction from condemnation. That the "state of facts" referred to does not, in itself, create a liability is obvious when it is brought to mind, as it must be, that the only fact designated in the instruction is that the "stairway with an iron railing upon the east and north, and open to the south, within the limits of the sidewalk, has been for a number of years as it now is." The effect of the instruction is to charge the municipal corporation with liability, without respect to the location of the opening, or its surroundings. This was an invasion of the province of the jury, as well as an incorrect statement of the law. It was for the jury to determine, from all the evidence, whether there was or was not a breach of duty arising out of the failure of the corporate authorities to exercise ordinary care. It is apparent to our minds that the trial court stretched a rule applicable only to the isolated element of notice to the wide field of negligence.

Our statement that the instruction erroneously declares what constitutes actionable negligence on the part of a municipal corporation requires, perhaps, some elaboration. There is, we may say at the outset, a stubborn conflict among the authorities as to whether a municipal corporation is, in any event, liable where one end and the side of an opening for a stairway into a basement is railed, although there may be an opening at the entrance of the stairway. Some of the cases declare that if the side and one end are railed, there is no liability, even though there is no gate at the entrance. See authorities cited, notes pp. 453, 454, Elliott Roads and Streets. But we do not think it necessary to enter the field of conflict, since it seems clear that it can not be

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adjudged as a pure matter of law that, irrespective of all questions of locality and surroundings, a municipal corporation is liable for an injury received by a person who falls into an opening made for a stairway where the entrance only is left open.

It is proper to say that the act which it is alleged made the sidewalk of the appellant unsafe was that of a third person, so that the case is governed by a different rule from that which prevails where the municipal corporation, by its own act, makes the street unsafe. *City of Warsaw v. Dunlap*, 112 Ind. 576.

The admission referred to in the instruction, and to which such a controlling force was given, was carried far beyond its legitimate meaning and effect, for it goes no farther than to concede that the cellar-way is in the same condition that it was at the time of its construction in 1867, so that the court clearly erred in giving it a construction. But conceding that the court did not err in this regard, still it is very clear that it did err in assuming to make the case turn solely upon the admission, for it was for the jury to consider other evidence, inasmuch as without some other evidence than that supplied by the admission, there could be no liability. It is evident, therefore, that the court, in thus excluding from consideration the other evidence, erred in its statement of the law, as well as by its invasion of the province of the jury.

Judgment reversed.

MILLER, J., did not participate in the decision of this case.

Filed March 14, 1891.

The State, *ex rel.* Wiseman *et al.*, *v.* Wheeler *et al.*

No. 14,701.

THE STATE, EX REL. WISEMAN ET AL., *v.* WHEELER ET AL.

GUARDIAN AND WARD.—Action on Bond.—Burden to Show Breach.—Exceptions to Report.—Burden.—In an action on a guardian's bond the burden is on the relator to show a breach of its condition; but on exceptions to his report the burden is on him to show that the money expended was for the best interests of his ward.

127	451
136	209
127	451
156	33

SAME.—Ex Parte Orders.—Effect.—Collateral Attack.—Ex parte orders made by the court in a matter of a guardianship, whether by way of direction to the guardian, or of approval of action theretofore taken by him, are regarded as *prima facie* correct, but, as a rule, are within the control of the court making them until final settlement of the guardianship. At any time before final settlement and discharge of the guardian they may be set aside, corrected, or modified, but they can not be collaterally attacked, as in a suit upon the guardian's bond for a misapplication of the funds of the trust. The only attack that can be made upon them is in a direct proceeding in the court having control over them.

SAME.—Action on Bond.—Plea of Payment.—Evidence.—In an action upon a guardian's bond for misapplication of the funds of the trust, under the general denial, the guardian may show an application of such funds pursuant to orders of the court, a plea of payment being unnecessary; and a witness may testify to the payment of the money pursuant to such orders, and to the fact that he ascertained the amount by calculation required to be paid over.

From the Hamilton Circuit Court.

W. Booth and C. D. Potter, for appellants.

T. J. Kane and T. P. Davis, for appellees.

McBRIDE, J.—This was a suit on a guardian's bond. The complaint charged the conversion by the guardian to his own use of a portion of the trust fund, and the unauthorized disbursement of a portion thereof, and that the guardian had failed and refused to account for or pay over the same to the relators, his wards, they having become of full age and demanded settlement. The guardian answered by general denial and plea of payment.

The cause was tried by the court, who, by request of the parties, found the facts specially and stated his conclusions of law thereon.

The State, *ex rel.* Wiseman *et al.*, *v.* Wheeler *et al.*

The finding and judgment are for the defendants, and the relators excepted to the conclusions of law and moved for a new trial, which motion was overruled, and the relators excepted.

Two errors are assigned:

First. That the court erred in its conclusions of law; and,

Second. That the court erred in overruling the motion for a new trial.

The second error assigned is not discussed, and is therefore waived.

Appellees insist that the remaining assignment is not sufficient to present any question to this court. Although somewhat informal, we regard it as sufficient.

The facts, as found by the court, are substantially as follows:

February 19, 1876, the defendant, Philip S. Wheeler, was, by the Hamilton Circuit Court, appointed guardian of the persons and property of the relators, Sarah E. Wiseman and John P. Wiseman, with Luther, Jr., Oliver E. and Henry F. Wiseman, all then infants, and with his co-appellees executed a bond as such guardian in the sum of \$3,000.

On the 21st day of August, 1876, there came into his hands as such guardian \$1,464.87, which was the sole and only estate ever received by him.

The father of these children died in 1874, and they thereafter resided with and were supported by their mother. In April, 1877, the mother made application to the circuit court of Hamilton county, representing that she was supporting them, but that her entire estate consisted of a house in which she resided, and sixty acres of wet and unproductive land, and that she was unable to support them without assistance from the guardian. On this application the court ordered the guardian to pay her \$400, which he did, and thereafter continued to assist her. In April, 1881, he submitted to the court a report, charging himself with the sum of \$1,700,

The State, ex rel. Wiseman et al., v. Wheeler et al.

being said sum of \$1,464.87, with interest, and claimed credit for \$733.99 as expended, leaving in his hands \$966.01.

This report the court approved. In 1879 the mother of the children voluntarily, and without consideration, conveyed her said real estate to her said children, reserving to herself a life-estate therein, and in February, 1884, she filed an application in the Hamilton Circuit Court, showing that there was no good house and barn on the land, and asking that the guardian be required to pay the balance yet in his hands to be used in the improvement of said property and the continued maintenance and education of said children.

The court granted the prayer of the petition, approved all payments previously made by the guardian, and ordered him to pay the balance to the mother. Thereupon the guardian, in obedience to the order of the court, paid to the mother the entire balance remaining in his hands, with accrued interest.

Incorporated in the special findings is an itemized statement of the several payments made by the guardian, from which it appears that the last payment was made in February, 1884, at the time said order of court was made. The court trying this cause finds that all of said payments were in fact made. This suit was commenced April 2d, 1888.

The record is silent as to whether or not the guardian has ever been discharged, although the court finds that in February, 1884, more than four years before the commencement of this suit, he had paid out all the money which had ever come to his hands.

Appellants insist that these payments were unauthorized; that the orders made by the court directing him to pay the money to the mother were without authority, and afforded no protection to the guardian. They also say: "We further insist that the burthen is on the appellee to show that his alleged expenditures were for the best interests of his wards, and the finding being silent on this question, this court can

The State, *ex rel.* Wiseman *et al.*, *v.* Wheeler *et al.*

not presume that any expenditures were for the wards' best interests."

Appellants mistake the relative positions occupied by them and the appellees in this suit. If these questions arose on exceptions to the guardian's report, or in any other way in the matter of the guardianship itself, the burthen would be on the guardian. This, however, is a suit on the guardian's bond, and the burthen is on the relators to show a breach of its conditions.

The special findings show that whatever action was taken by the guardian was by express order of the court or was subsequently approved by the court, and that in obedience to such orders he had paid out all the money that ever came to his hands as such guardian.

The several orders made by the court in directing the guardian to pay money to the mother, and approving the reports filed seem to have been *ex parte* orders, such as are usually made in passing accounts current of guardians and partial reports of executors and administrators, unless, indeed, the last order, which requires the payment of the entire balance, may be considered as finally closing the guardianship.

Ex parte orders made by the court in the matter of a guardianship, whether by way of direction to the guardian, or of approval of action theretofore taken by him, like those made in the settlement of an estate, are regarded as *prima facie* correct, but are as a rule within the control of the court making them until final settlement of the guardianship. Such orders may, at all times, before final settlement and discharge of the guardian, be set aside, corrected or modified if the requirements of justice demand it.

They can not, however, be attacked collaterally. So long as they remain in force they constitute an adjudication of the matter to which they properly relate, and can not be attacked collaterally in a suit on the guardian's bond. If attacked it must be by a direct proceeding in the court having

The State, *ex rel.* Wiseman *et al.*, *v.* Wheeler *et al.*

control over them. *Parsons v. Milford*, 67 Ind. 489; *Castetter v. State, ex rel.*, 112 Ind. 445, and cases cited.

None of the several orders directing the payment of money by the guardian, or approving the action taken by him, appear to have been vacated or changed.

Whether they were rightfully or wrongfully made can not be considered in this action unless, indeed, they were for some reason beyond the power of the court assuming to make them, and were void. They were made by a court having jurisdiction of the subject-matter and of the parties. If they were wrongfully made they might have been vacated or modified on application and showing to the Hamilton Circuit Court in the guardianship. Or the guardian might have resisted them, or obtained their vacation or modification by showing that they were not justified by the facts. If the question sought to be presented by appellants had been thus brought to the attention of the court the case of *Martin v. Beasley*, 49 Ind. 280, cited by appellants, would be in point; but, unlike that case, here the guardian obeyed the order of the court. There the guardian resisted it, and the attack upon the order was direct.

Judgment affirmed, at appellants' costs.

Filed Jan. 27, 1891.

ON PETITION FOR A REHEARING.

McBRIDE, J.—Appellants ask a rehearing in this cause on the ground that the court failed to consider one of the errors assigned.

In the original opinion it is said that the second error assigned was not discussed, and was, therefore, waived. A re-examination of the brief shows that this error was discussed, although the manner in which the brief was arranged caused it to be overlooked.

This alleged error was in overruling appellants' motion for a new trial. Several reasons were assigned for a new trial, but only two of these are discussed.

The State, *ex rel.* Wiseman *et al.*, *v.* Wheeler *et al.*

On the trial of the cause the guardian called as a witness one Theo. P. Davis, who testified that he assisted in making a settlement between the guardian and the mother of the wards, in February, 1884, at the time when the guardian was ordered by the court to pay to the mother the balance remaining in his hands. He also testifies that he had previously prepared the petition and had procured the order of court directing the guardian to pay said balance to the mother, and that thereupon the guardian and the mother met in his office for the purpose of determining the amount of said balance, and that he made the necessary computations for them in such settlement.

At the proper time appellants objected to this testimony. Their objection, as set out in the record, is "that there is no settlement pleaded, and no issue tendered to support such testimony, and because it is irrelevant, incompetent and immaterial."

The objection being overruled, the question was properly saved by exception.

The objection, without considering the question of its sufficiency otherwise, was not well taken. The complaint charged the conversion by the guardian of a portion of the trust fund, and the unauthorized disbursement by him of a portion of such fund.

The guardian's defence was, that while he had disbursed all of the moneys which came to his hands as such guardian, such disbursement was authorized, having been made to the mother of his wards in obedience to the order of the court which appointed him. This he could show under the general denial. This testimony tended to establish the fact of the payment of the money to the mother as the court had directed and was clearly competent.

It is possible that the several orders to the guardian to pay his wards' money to the mother ought not to have been made. As we said, however, in the original opinion, that

The State, *ex rel.* Hamilton, *v.* Engle.

question can not be here considered for the reason that these orders can not be attacked collaterally.

The only remaining question argued is that the finding of the court is not sustained by, but is contrary to, the evidence.

Appellants urge, in support of this contention, that there is no evidence whatever tending to show that the payments were justifiable—that there was any necessity for paying such amount of money to the mother for the maintenance of the wards, or that the estate was managed for the best interests of the wards.

It is enough to say that the evidence does tend to show that the money was all disbursed in obedience to the orders referred to, and while these orders stand we can go no further with our inquiry.

There being evidence to sustain the finding of the court it will not be disturbed.

Petition for rehearing overruled, with costs.

Filed March 18, 1891.

No. 14,875.

THE STATE, EX REL. HAMILTON, *v.* ENGLE.

127	457
153	38
127	457
134	67
134	268
127	457
151	244

MANDAMUS.—*To Justice of the Peace.—Dismissal of Action.—Judgment for Costs.—Issuance of Execution.*—Where a civil suit is dismissed by a justice of the peace for want of prosecution, he may be compelled by mandamus to enter a judgment in favor of the defendant against the plaintiff for his costs, and to issue an execution thereon.

From the Sullivan Circuit Court.

J. C. Chaney and W. S. Maple, for appellant.

A. B. Williams, J. T. Beasley, G. W. Buff and J. S. Bays, for appellee.

OLDS, C. J.—This is a proceeding brought by the appellee.

The State, *ex rel.* Hamilton, *v.* Engle.

lant against the appellee to compel the appellee, a justice of the peace, to enter up a proper judgment for costs and issue a writ for the collection thereof.

The appellant filed his complaint in the circuit court in two paragraphs. The appellee demurred to the second paragraph. The record shows the sustaining of the demurrer to both paragraphs, and exceptions. Judgment upon demurrer in favor of the appellee.

This appeal is prosecuted and the ruling of the court assigned as error.

It appears by the facts alleged in the complaint that William G. Engle, appellee, is a justice of the peace in Sullivan county; that one Hoke brought a suit before said justice against the relator on a promissory note; that relator demanded a jury, and the cause was tried by a jury on September 5th, 1887, and the jury disagreed and was discharged. No further proceedings were had in the case, and on the 8th day of November, 1887, in the absence of the parties to the suit, the justice entered a dismissal of the cause and entered the same on his docket as follows:

“November 8th, 1887. The above cause is hereby dismissed for want of prosecution.

“W. G. ENGLE, Justice.”

That the relator had no notice or knowledge of the dismissal of said suit until on the 27th day of January, 1888, when a fee-bill was issued by said justice against him for the costs made by him; that thereupon relator immediately demanded of the justice that he tax all of the costs in said cause to the plaintiff therein, and issue an execution for the collection thereof against the said plaintiff Hoke; that Hoke is solvent and is liable for all said costs, and this suit is brought and the relator asks that the appellee, said justice, be ordered to properly tax said costs to and against the plaintiff, make the proper entries in said cause, and to issue the proper writ for the collection thereof.

It is a well settled rule that mandamus will lie against a

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justice of the peace to compel such justice to enter judgment, to make correct docket entries in accordance with the facts, and to perform all duties that are purely ministerial, but their discretion will not be controlled by mandamus. Mandamus will not lie where there is some other adequate remedy.

In the case of *Smith v. Moore*, 38 Conn. 105, it is held that mandamus will lie at the instance of a party aggrieved, to compel a justice to make a true record of a judgment rendered by him, and to furnish a copy to such party when demanded, and that the superior court has jurisdiction to determine whether such record or copy is correct. In *Anderson v. Pennie*, 32 Cal. 265, it is held that a mandamus will lie to compel a justice of the peace to enter a judgment of dismissal of a cause. And in *People, ex rel., v. Barnes*, 66 Cal. 594, it is held that mandamus will lie to compel a justice to proceed with the preliminary examination of a person regularly charged with, having committed a public offence. *Forman v. Murphy*, 3 N. J. L. 577; *Harrison v. Emmerson*, 2 Leigh, 764; *State, ex rel., v. Edwards*, 51 N. J. L. 479; *State, ex rel., v. Van Ells*, 69 Wis. 19; *Logansport, etc., R. R. Co. v. Groniger*, 51 Ind. 383; *State, ex rel., v. Grubb*, 85 Ind. 213; *Moore v. State, ex rel.*, 72 Ind. 358.

In the case at bar the justice entered a judgment of dismissal of the cause. Upon such a judgment being entered the relator, the defendant in such suit, was *prima facie* entitled to recover his costs from the plaintiff, and it was the duty of the justice to enter up a judgment in favor of the defendant against the plaintiff for his costs. The law fixed the liabilities and rights of the parties as to costs.

In the case of *Pittsburgh, etc., R. W. Co. v. Town of Elwood*, 79 Ind. 306, the court says: "Under our system of jurisprudence, the taxation of costs has always been a ministerial and not a judicial act, and officers entitled to charge costs have been authorized to tax such costs, from time to

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time, as the services for which they may be taxed shall be rendered."

The mere taxation of costs is a ministerial act. A case may arise as to the amount of costs to be taxed, or concerning the taxing of costs, the determination of which would invoke the judicial powers of the justice of the court in which such question is presented, but no such question arises in this case. *State, ex rel., v. Jackson*, 68 Ind. 58.

Section 590, R. S. 1881, provides that "In all civil actions, the party recovering judgment shall recover costs, except in those cases in which a different provision is made by law." In the case at bar, when the judgment of dismissal was entered the defendant in the case was entitled to recover his costs, unless there be an affirmative showing of some facts by the plaintiff which entitled him to have some portion of the costs taxed against the defendant therein. No such state of facts is shown by the record.

Section 1506 makes it the duty of justices to issue execution on all judgments.

The relator has no other adequate remedy; until a judgment was rendered he could not appeal from it. He is not complaining of the judgment of dismissal. The injury he sustains is on account of the failure of the justice to enter the proper judgment in his favor for costs. It was the duty of the justice, on entering the judgment of dismissal, to enter a judgment in favor of the relator, the defendant, in such action for his costs, against the plaintiff therein, and to issue an execution on the same at the proper time. Having failed to discharge such duty the relator is entitled, under the facts alleged in his complaint, to an alternative writ of mandate requiring appellee, the justice, to render up such judgment and issue an execution thereon, or to show cause why he should not do so.

The relator is entitled to a judgment against the plaintiff in said cause for his costs, and to have an execution issued for the collection of them. The costs made by the plaintiff in

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said cause the relator is not liable for, and has no interest in them ; such costs are collectible by fee-bill against the plaintiff.

The court erred in sustaining the demurrer to the complaint.

Judgment reversed, with instructions to overrule the demurrer.

Filed March 17, 1891.

127	461
129	191
127	461
143	487
143	680
127	461
149	680
127	461
154	548

No. 14,716.

**THE CINCINNATI, INDIANAPOLIS, ST. LOUIS AND CHICAGO
RAILWAY COMPANY v. SMITH.**

VENDOR AND PURCHASER.—Possession.—Notice.—Where the owner of a farm conveys to a railroad company a strip of land eighty feet wide for a right of way and the company takes possession of forty feet only and fences the same in and constructs its road thereon, leaving the remaining forty feet in the possession of the owner, who continues to use it as a part of his farm, the conveyance not having been recorded, the railroad company's possession of the part occupied and used is not constructive notice to a subsequent purchaser of the farm of the extent of the railroad company's purchase. Nor is a recital of the deed to such purchaser to the effect that his conveyance is subject to the right of way of the railroad company notice to him that such right of way is of greater extent than the way actually occupied.

PLEADING.—Reply.—Demurrer.—Practice.—A reply, pleaded with the general denial, which sets up only such facts as are admissible under the general denial, is demurrable, and the subsequent withdrawal of the general denial will not render the ruling sustaining the demurrer available error.

From the Decatur Circuit Court.

J. K. Ewing and C. Ewing, for appellant.

J. D. Miller and F. E. Gavin, for appellee.

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COFFEY, J.—This was an action by the appellee against the appellant to recover the possession of real estate.

The complaint is in the statutory form usually employed in such actions.

The appellant filed a counter-claim alleging, in substance, that it owned the land in controversy, having acquired title thereto by deed from Henry L. Burk on the 18th day of December, 1852; that said land consists of a strip deeded for the right of way for a railroad; that the appellant and its grantors successively took and held possession of said right of way by constructing a railroad thereon, and by running daily a large number of trains thereon with engines, etc., giving thereby notice of their ownership continuously, but that its deed had never been recorded.

The second paragraph of the appellee's answer to the counter-claim, averred that the deed of Burk for a right of way, described in said counter-claim, conveyed a strip of land eighty feet wide; that the company took possession of forty feet only, and fenced the same in and constructed its road thereon, leaving the remaining forty feet in the possession of said Burk who continued to cultivate the same; that said deed was never recorded; that the land described in the complaint is land of which the appellant never took possession, and that the appellee, without any notice of said deed, and without any notice or knowledge that the appellant owned or made any claim thereto, purchased the same for a valuable consideration, and took a conveyance therefor.

The appellant filed a reply in two paragraphs. The first paragraph alleged that the appellee at the time he purchased the real estate in controversy, as set out in said answer, had actual knowledge of the existence of a right of way owned by the appellant, and took his deed thereto with a written stipulation contained therein that the title so conveyed was subject to the right of way held by the appellant.

The second paragraph of the reply was a general denial.

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The court sustained a demurrer to the first paragraph of the reply and appellant excepted.

Some days after this ruling the appellant withdrew the second paragraph of the reply, and appellee had judgment on his answer to the cross-bill.

The assignment of error calls in question the correctness of the ruling of the circuit court in sustaining the demurrer to the first paragraph of the reply to the second paragraph of the answer to the counter-claim filed by the appellant.

It is insisted by the appellant that the second paragraph of the reply negatived every allegation found in the answer which tended to show that the appellee purchased the land in dispute without notice of appellant's claim, and that the recital in the deed to the appellee was sufficient to put him on inquiry, by means of which he could have ascertained the extent of the appellant's claim.

This contention is met by the claim on the part of the appellee that the first paragraph of the reply was nothing more than an argumentative denial, and as there was a direct denial pleaded in the second paragraph of the reply, there was no available error committed in sustaining the demurrer, and that the appellant could not convert the ruling into available error by subsequently withdrawing the general denial.

In its essential features this case is not unlike the case of *Jeffersonville, etc., R. R. Co. v. Oyler*, 82 Ind. 394. In that case it was held that where the owner of a farm sells a portion thereof, and the purchaser takes possession of a part only of the portion sold, the vendor retaining possession of and using the residue as a part and parcel of his farm, the conveyance not having been recorded, the vendee's possession of the part occupied and used by him is not constructive notice to a subsequent purchaser of the farm of the extent of his purchase. Mere possession by a vendee is notice of the vendee's rights to the land actually occupied, and no more. *Krider v. Lafferty*, 1 Whart. 303.

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The answer of the appellee to the counter-claim filed by the appellant was sufficient, and the first paragraph of the appellant's reply thereto was nothing more than an argumentative denial of the facts averred in the answer. Every fact alleged in this reply could have been given in evidence under a general denial to the answer of the appellee. As the general denial was pleaded to this answer there was no available error in sustaining a demurrer to the reply in question, which was only an argumentative denial. *Manhattan Life Ins. Co. v. Doll*, 80 Ind. 113; *Uhl v. Harvey*, 78 Ind. 26; *West v. West*, 89 Ind. 529; *Berlin v. Oglesbee*, 65 Ind. 308.

As it was not available error to sustain a demurrer to the reply at the time of the ruling, we do not think the appellant could make it available by withdrawing the general denial on a subsequent day. In the case of *Kidwell v. Kidwell*, 84 Ind. 224, the question involved here was decided by this court. In that case the court said: "In considering the second error assigned, the sustaining of the demurrer to the second paragraph of the answer, it may be observed that the first paragraph of the answer, a general denial, was in, and that everything contained in the second paragraph was admissible in evidence under the first. And if the second paragraph was good, the sustaining of the demurrer to it was a harmless error. Appellant's subsequent withdrawal of the first paragraph could not change the force and effect of the ruling upon the second."

If the ruling of the circuit court was harmless at the time it was made nothing could be done by the appellant, at a subsequent stage of the proceeding, which would authorize us to declare it such error as would work a reversal of the judgment.

Furthermore, we are of the opinion that the recital in the deed to the appellee to the effect that his conveyance was subject to the right of way of the appellant was not notice to him that such right of way was of greater extent than the way

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of which it had taken actual possession and was then occupying. *Jeffersonville, etc., R. R. Co. v. Oyler, supra.*

There is no error in the record.

Judgment affirmed.

MILLER, J., took no part in the decision of this cause.

Filed March 18, 1891.

No. 15,847.

THE STATE v. KERN.

127 465
151 488

CRIMINAL LAW.—*Appeal by the State.*—*Instruction.*—*Review.*—In an appeal by the State, where there is no statement in the bill of exceptions showing that there was evidence to which the instructions requested were relevant, no question of law is presented upon the refusal of the request.

From the Clinton Circuit Court.

M. B. Beard, Prosecuting Attorney, and *W. R. Moore*, for the State.

S. O. Bayless, C. G. Guenther and J. Claybaugh, for appellee.

ELLIOTT, J.—This appeal is prosecuted by the State, and counsel assume that the record presents questions of law upon the refusal to give instructions asked by the State, but we can not regard this assumption as valid.

There is no statement in the record showing that the instructions were relevant to the evidence, and hence no question of law is presented for decision. Without some statement of the evidence we must presume that the instructions were refused, because there was no evidence to which they were applicable. While it is true that it is neither necessary nor proper in appeals by the State to set forth the evidence

Baker *et al.* v. Bourne *et al.*

in full, it is also true that there must be some statement in the bill of exceptions showing that there was evidence to which the instructions were relevant. It is a familiar rule of appellate procedure that the court will not decide mere abstract questions, and where there are no facts stated only abstract questions can, in such a case as this, arise upon a ruling refusing instructions.

Judgment affirmed.

Filed March 17, 1891.

No. 14,794.

BAKER ET AL. v. BOURNE ET AL.

DESCENT.—*Nephews and Nieces.*—*Take per Capita, and not per Stirpes.*—The nephews and nieces of an intestate, being next of kin, inherit directly from him, and not through their parents, and, all standing in the same degree of relationship, take in equal portions.

From the Decatur Circuit Court.

B. W. Baker, J. K. Ewing, C. Ewing, M. D. Tackett and B. F. Bennett, for appellants.

J. D. Miller and F. E. Gavin, for appellees.

COFFEY, J.—This was a suit for the partition of the land described in the complaint, instituted by the appellants against the appellees in the Decatur Circuit Court.

At the request of the parties the court made a special finding of the facts in the cause, and stated its conclusions of law thereon.

It appears from the special finding of facts that Benjamin F. Williams, who resided in Butler county, in the State of Ohio, died intestate on the 2d day of June, 1888, the owner in fee of the land described in the complaint in this cause. The said Williams left neither a widow, child or children,

Baker *et al.* v. Bourne *et al.*

nor the descendants of a child or children, nor father or mother nor brother or sister, but left as his only heirs at law the following nephews and nieces and grand-nephews, to wit: Marsh W. Baker, John W. Baker and Hannah Frazee, children of Sarah Baker, deceased, who was a sister of the said Benjamin F. Williams, and who departed this life prior to the death of the said Williams; and, also, Marsh Bourne, Ezra Bourne, David Bourne and Nancy Marshall, children of Mary Bourne, a sister who died prior to the death of the said Williams; also, Brazilla Inman, only child of Sarah Inman, a deceased daughter of the said Mary Bourne, and Carl E. Bourne and Earl Bourne, only children of Virgil Bourne, a deceased son of Mary Bourne, deceased.

Sarah Inman and Virgil Bourne both died prior to the decease of the said Benjamin F. Williams.

Upon these facts the court stated as a conclusion of law that the nephews and nieces of the said Benjamin F. Williams each took an equal share in the land described in the complaint.

The assignment of error calls in question the correctness of the conclusion of law stated by the circuit court.

This case is ruled by the conclusion reached in the case of *Cox v. Cox*, 44 Ind. 368, and the case of *Blake v. Blake*, 85 Ind. 65.

The nephews and nieces being the next of kin to Benjamin F. Williams, inherited directly from him, and not through their parents, and, all standing in the same degree of relationship, took in equal portions.

The court did not err in its conclusions of law.

Judgment affirmed.

MILLER, J., took no part in the decision of this cause.

Filed March 17, 1891.

Bruce, by Next Friend, *v.* Tyler.

No. 14,868.

BRUCE, BY NEXT FRIEND, *v.* TYLER.

MALICIOUS PROSECUTION.—*Evidence.*—Where a mother and her thirteen-year-old son living with her were arrested for larceny and acquitted, evidence of the bad reputation of the mother for honesty is inadmissible on behalf of the defendant in an action by the son for malicious prosecution.

From the Cass Circuit Court.

N. L. Agnew, B. Borders and D. C. Justice, for appellant.

OLDS, C. J.—This was an action brought in the court below by the appellant against the appellee for damages for malicious prosecution. The trial resulted in a verdict and judgment for the appellee.

The cause comes to this court upon a reserved question of law under section 630, R. S. 1881.

The bill of exceptions states that the evidence tended to prove that on the 22d day of October, 1887, the appellee caused the plaintiff, Milo Bruce, to be arrested jointly with one Sarah E. Bruce, his mother, and taken before a justice of the peace of Pulaski county, on a charge made by said appellee against them of stealing turkeys, the property of said appellee, of the value of \$5.50; that on a preliminary examination before the justice they were recognized to appear in the circuit court to answer said charge, and in said circuit court appellee charged them by affidavit, sworn to by him, with the same crime, and an information was also filed in the circuit court, and on the trial in the circuit court they were acquitted.

The appellant was, at the time, about thirteen years of age, and lived with his parents, one of whom was his co-defendant in such prosecution.

The evidence further tended to show that Sarah E. Bruce at that time owned about one hundred turkeys, and the appellee owned sixty-five turkeys; that both Sarah E. Bruce's

Bruce, by Next Friend, v. Tyler.

and appellee's turkeys were mixed with a breed known as "bronze" turkeys; that on the 20th day of October, 1887, Sarah E. Bruce sold, in Winamac, Indiana, twelve turkeys of this mixed breed; that her son, the appellant, drove them to town and was present when she sold them; that these turkeys were raised by Mrs. Bruce, and by her order Milo caught them on the morning of the day they were sold; that appellee lost no turkeys and had as many before as after the arrest; that appellee claimed to have lost thirty-three turkeys on the 20th day of October, 1887; that appellant introduced other competent evidence tending to prove all the allegations of his complaint, and Sarah E. Bruce was not called, nor sworn as a witness, and did not testify as a witness for the appellant in chief in this cause; that the appellee to sustain the issues on his part, called as a witness one Caroline Dipert who was duly sworn as a witness, and thereupon the appellee asked her the following question:

"Q. You may state, Mrs. Dipert, if you are acquainted with the general reputation of Mrs. Bruce, the old lady in the neighborhood where she is known? Was you acquainted with her reputation, say the 20th of October, 1887, for honesty? And she answered: Yes, sir."

The witness was asked the further question, "state what that reputation was, good or bad," and she answered that it was "bad."

Objection was made by counsel for the appellant, at the proper time, as to the competency of the evidence; the objection was overruled. A motion was also made to strike out the evidence, which was also overruled, and exceptions reserved to the rulings of the court, and the question as to the competency of the evidence is properly presented.

This evidence is clearly incompetent, and it was error to admit it.

The parents are the natural custodians of a child of the age of the appellant. His association with his mother can not be said to be of his own volition. His parents, who

Bruce, by Next Friend, v. Tyler.

were living together, had the lawful right to his custody, and it was his duty to confide in them and obey all reasonable and lawful commands which they might give. The fact that the mother with whom he lived might have a bad reputation for honesty, constituted no grounds for the arrest of the son for the crime of larceny. In some instances, the general bad character of the party himself might, when considered with other facts, tend to establish probable cause for his arrest, but to hold that the bad reputation of the mother of a boy thirteen years old with whom he lived may be proven as tending to establish probable cause for the arrest of such a boy for the crime of larceny, is carrying the doctrine of proof as to character entirely too far to be permitted. It is very doubtful, even in a case where persons of mature years voluntarily associate themselves together, and a crime is committed, and they are arrested, charged with the commission of it and acquitted, and one of them brings suit for damages for malicious prosecution, whether it would be proper to consider the reputation of the other defendant in determining whether the person instituting the prosecution had probable cause for so doing, but certainly such evidence is not proper in such a case as the one at bar. See *Armstrong v. Grogan*, 5 Sneed (Tenn.), 108; 1 Hilliard Torts, p. 434, section 19; *Brainerd v. Brackett*, 33 Me. 580; *Helburn v. Neal*, 4 Dana, 120; *Peck v. Chouteau*, 91 Mo. 138; *Patterson v. Garloch*, 39 Mich. 447; *Falvey v. Faxon*, 143 Mass. 284; *Walker v. Pittman*, 108 Ind. 341; *Oliver v. Pate*, 43 Ind. 132; *Peden v. Mail*, 118 Ind. 560; *Adams v. Bicknell*, 126 Ind. 210; *Cottrell v. Cottrell*, 126 Ind. 181; *Winemiller v. Thrash*, 125 Ind. 353.

The court erred in admitting the evidence.

Judgment reversed, at costs of appellee, with instructions to the circuit court to grant a new trial.

Filed March 18, 1891.

Williams *et al.* v. The State.

No. 15,963.

WILLIAMS ET AL. v. THE STATE.

SUPREME COURT.—Practice.—No question is presented on the ruling of the trial court in excluding, in a prosecution for rape, a report made by the grand jury where the report is not embodied in the bill of exceptions.

From the De Kalb Circuit Court.

L. J. Blair and W. H. Dills, for appellants.

A. G. Smith, Attorney General, and *E. A. Bratton*, for the State.

ELLIOTT, J.—The appellants were convicted of the crime of rape, and from the judgment entered against them they prosecute this appeal.

It is asserted that the trial court erred in excluding a report made by the grand jury, but the report is not embodied in the bill of exceptions, and hence no question is presented upon the ruling. In the absence of the document we can not say that it was competent, but must presume that it was incompetent. An appellant who seeks a reversal must overcome the presumption which always prevails in favor of the rulings of the trial court in the absence of countervailing facts.

We have given the evidence careful study, and find that it so far and sufficiently supports the verdict that we can not disturb it.

Judgment affirmed.

McBRIDE, J., did not take part in the decision of this case.

Filed March 18, 1891.

Schrichte v. Stites' Estate.

No. 14,386.

SCHRICHTE v. STITES' ESTATE.

DECEDENTS' ESTATES.—*Claim.*—*Time of Filing.*—A claim not filed within thirty days before final settlement of the estate is barred, and the fact that it is on file before the final settlement report is approved does not delay the settlement.

SAME.—*Administrator's Charges.*—*Who May not Object to.*—One who has no interest in the estate as creditor or otherwise can not object to the charges made by the administrator on account of services rendered by himself and his counsel.

SUPREME COURT.—*Time of Filing Brief.*—*Petition for Rehearing.*—A claim filed against an estate and disallowed, was, on appeal by the claimant, omitted from the transcript, but the appellant's argument proceeded on the assumption that the record was complete. Subsequently, upon *certiorari*, the record was amended.

Held, on the affirmance of the judgment, that a rehearing would not be granted to enable the appellant to file a supplemental brief because of such amendment.

From the Fayette Circuit Court.

G. C. Florea, B. F. Miller and F. J. Hall, for appellant.
J. I. Little and D. W. McKee, for appellee.

BERKSHIRE, J.—The appellee filed his final settlement report, and caused notice to be given thereof as required by law.

Two days in advance of the day designated for the court to examine said report for approval the appellant filed a claim against said estate, and thereafter, but before the court had considered said report, he filed exceptions thereto as follows: (1). That there was a claim on file that the appellee had neither allowed nor disallowed. (2). That the appellant held a claim against said estate of which the appellee had notice when he assumed the trust, and which claim he had failed and refused to pay; and (3), excessive charges made by the administrator for the services of himself and his counsel in the settlement of the estate.

The appellee demurred separately to the exceptions, and

Schrichte v. Stites' Estate.

the court having sustained his demurrer the appellant excepted, and the court approved said report and final settlement, and discharged the appellee from his trust.

The errors assigned call in question the ruling of the court in sustaining the demurrer of the appellee to the exceptions.

We do not stop to inquire as to whether it was proper practice to test the sufficiency of the exceptions by demurrer, for the reason that the right result was attained, and hence the appellant can not complain, even if his mode of procedure was irregular.

The appellant was required by the statute to file his claim within thirty days before final settlement of the estate, and having failed so to do, his claim was barred. Elliott's Supp., section 385; *Roberts v. Spencer*, 112 Ind. 85; *Roberts v. Spencer*, 112 Ind. 81.

The claim not being enforceable against the estate when filed, the fact that it was on file before the final settlement report was approved, did not operate to delay the settlement of the estate.

If the claim was a just one it is probable the administrator might have paid it without requiring that it be filed in court, but he was not bound to do so.

As the appellant had no interest in the estate as creditor, or otherwise, he could not object to the charges made by the administrator on account of services rendered by himself and his counsel.

We find no error in the record.

Judgment affirmed, with costs.

Filed Jan. 7, 1891.

ON PETITION FOR A REHEARING.

MILLER, J.—A petition, supported by the affidavit of one of appellant's attorneys, has been filed for a rehearing. The ground upon which it is asked is to enable the appellant to file a supplemental brief, which he supposes was made necessary by reason of the amendment of the record upon *certi-*

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orari, by bringing into the transcript the claim filed against the estate, which brief he did not file prior to the adjudication on account of his failure to obtain notice of the return to the *certiorari*.

A rehearing will not be granted to enable a party to file a brief or to move for the dismissal of the appeal (*Board, etc., v. Hall*, 70 Ind. 469; *Bitting v. Ten Eyck*, 82 Ind. 421) or to correct the transcript. *Porter v. Choen*, 60 Ind. 338; *Board, etc., v. Center Tp.*, 105 Ind. 422.

In this case the appellant filed his brief on the 18th day of July, 1888, in ignorance, we may infer, of the omission of the claim from the transcript; as the case was argued upon that assumption we fail to see why the making of the correction should call for an additional argument.

The application for the *certiorari* was made in behalf of the appellant on the 18th day of November, 1890, and the correction returned December 11th, and judgment affirmed January 7th, 1891. No sufficient excuse is disclosed for the failure to file such briefs as counsel desired within the time fixed by the rules of this court.

No questions of law are argued in the petition, and we are satisfied with the original opinion.

The petition for a rehearing is overruled.

Filed March 20, 1891.

No. 16,072.

McLAUGHLIN v. ETCHISON.

JUDGMENT.—*Erroneous.—Collateral Attack.*—A judgment of conviction of a misdemeanor by a justice of the peace upon an affidavit which fails to charge a public offence, while erroneous is not void, and can not be attacked collaterally.

HABEAS CORPUS.—*Erroneous Judgment. — Imprisonment in Pursuance of.*—Where, pursuant to an erroneous judgment of conviction, the accused is

127	474
182	252
127	474
138	107
127	474
142	343
127	474
152	578
127	474
154	113
155	418
156	39
156	40
127	474
157	89
157	176
127	474
159	686
127	474
163	467
127	474
	666
	670

McLaughlin v. Etchison.

committed to jail by a justice of the peace for failing to pay or replevy the fine, he is not entitled to a writ of *habeas corpus* to regain his liberty.

CRIMINAL LAW.—*Mittimus*.—A delay of twelve days by the justice of the peace in performing his duty to commit to jail a defendant in a criminal cause who does not immediately pay or replevy a fine, does not render the *mittimus* void.

From the Madison Circuit Court.

S. A. Forkner, for appellant.

McBRIDE, J.—This was a petition for a writ of *habeas corpus* by the appellant, who alleged that he was unlawfully restrained of his liberty by the appellee, the sheriff of Madison county. A writ was awarded, but on motion of the appellee was quashed. This action of the court is assigned as error.

From the petition the following facts are gathered: On the 19th day of February, 1891, an affidavit was filed with Benjamin McCarty, a justice of the peace of Madison county, which was evidently drawn under section 2066, R. S. 1881, charging, or attempting to charge, appellant and another with the erection and maintenance of a public nuisance. On this affidavit a warrant was issued, appellant was arrested and brought before said justice, when he was, on the 20th day of February, 1891, tried and adjudged guilty, and a fine of \$10 and costs assessed against him, with an order that he stand committed until the fine should be paid or replevied. He was allowed to go until the 4th day of March, 1891, when the fine not being paid or replevied, a *mittimus* was issued by the justice, and he was committed to the common jail of Madison county.

His conviction was clearly erroneous. The affidavit upon which the prosecution was based did not charge a public offence. It is not necessary to point out its defects further than to say that it at most charges an interference with the free use by Fraly of his property by the erection of what is styled a "high and useless fence." The facts, properly

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pleaded in a civil suit, might entitle the party to damages and to the abatement of the nuisance.

Notwithstanding the judgment of conviction was erroneous it was not void. The justice had jurisdiction of the subject-matter ; that is, he had jurisdiction to hear and determine a charge, under section 2066, R. S. 1881, of the erection or maintenance of a public nuisance. He also had jurisdiction of the person of the appellant, and the judgment rendered by him can not be attacked collaterally.

The writ of *habeas corpus* can not be used for the mere correction of errors. To be entitled to the writ in a case like this the party complaining must show a void judgment. A judgment that is merely erroneous, no matter how gross the error, will not suffice. *Willis v. Bayles*, 105 Ind. 363 ; *Cooley Const. Lim.*, marginal p. 348 ; *Lowery v. Howard*, 103 Ind. 440 ; *Holderman v. Thompson*, 105 Ind. 112 ; *Commonwealth, ex rel., v. Leckey*, 26 Am. Dec. 37, and note ; 9 Am. & Eng. Encyc. of Law, p. 227, and cases cited ; *Ex parte Watkins*, 3 Peters, 193.

Section 1119, R. S. 1881, provides as follows : " No court or judge shall inquire into the legality of any judgment or process whereby the party is in his custody, or discharge him when the term of commitment has not expired, in either of the cases following." * * *

"Second. Upon any process issued on any final judgment of a court of competent jurisdiction."

The case at bar comes clearly within the provisions of this statute.

Appellant insists, however, that the *mittimus* is void, because not issued until the 4th day of March, twelve days after the rendition of the judgment ; that because he was not at once committed to jail in default of payment the justice lost jurisdiction, and could not thereafter issue a valid *mittimus*.

It is the duty of a justice of the peace, if a defendant in a criminal cause does not immediately pay or replevy a fine

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adjudged against him, to commit him to jail. While this should be done at once, we know of no reason why, if for any reason it is not done, the justice may not issue a *mittimus* thereafter. We think he may. Nor do we think a defendant is in a situation to complain, either of the negligence of the justice or of the indulgence extended to him by giving him time without bail for the payment of money which is immediately due.

Appellant complains that the justice, by allowing him to go, misled him, and induced him to believe no effort would be made to enforce the judgment, and that for this reason he did not appeal within the time limited by law. If this was the motive which led the justice to delay issuing the *mittimus* it was of course very reprehensible, but can not affect the question before us.

The court did not err in quashing the writ.

Judgment affirmed, with costs.

Filed March 31, 1891.

No. 14,897.

COOK v. QUICK.

127 477
e171 557

HIGHWAY.—Vacation Proceedings.—Order Approving Report of Reviewers.—
May beAppealed from.—Where, in a proceeding to vacate a highway, viewers are appointed who report in favor of the vacation, and upon remonstrance reviewers are appointed who report against the vacation, an appeal will lie to the circuit court from the final order of the board approving the report of the reviewers, and the case may there be tried *de novo*. *McKee v. Gould*, 108 Ind. 107, and *Bowman v. Jobs*, 123 Ind. 44, distinguished.

COFFEY, J., dissents.

SAME.—Inutility of Highway.—Finding.—Where the circuit court, without the intervention of a jury, finds that a highway will not be of public utility, and that it should be vacated, this court will not disturb the finding where there is evidence to support it.

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SAME.—Damages for Vacation.—Court's Refusal to Allow.—New Trial.—A person through whose land an established highway is sought to be vacated is entitled to recover such damages as he may sustain by the vacation; and where the evidence is undisputed that such person is entitled to damages, the remonstrant should be given a new trial on the refusal of the court to allow damages.

From the Boone Circuit Court.

T. W. Lockhart and T. J. Cason, for appellant.

OLDS, C. J.—This cause was commenced before the board of commissioners of Boone county on the petition of the appellee and others to vacate a highway. The board of commissioners, on hearing the petition, appointed three viewers. Said viewers, so appointed, at the next session of said board, reported in favor of the vacation of the highway. On the filing of such report, and before the board acted upon the same, the appellant, John E. Cook, filed his remonstrance against the vacation, stating that he had no other outlet from his dwelling and lands, which he owns, adjoining said highway, and that the vacation of the highway will not be of public utility, and for the further grounds that he will be damaged in the sum of \$150 by the vacation of said highway. He asked that said road be not vacated, and, if vacated, that he be allowed his damages as claimed in the remonstrance.

Upon the filing of the remonstrance the board of commissioners appointed three reviewers. The reviewers reported to said board that said highway is of public utility; that it be not vacated; that there could be no damages assessed in favor of said remonstrant unless said highway be vacated, and, having reported against the vacation of it, they assessed no damages in his favor.

The board of commissioners approved the report of the reviewers, and the appellee, Quick, in vacation, appealed to the circuit court. A trial was had in the circuit court without the intervention of a jury, and the court found generally for the petitioners that said highway was not of public utility and should be vacated, and rendered judgment against

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the remonstrant for the costs. The appellant filed a motion for a new trial, which questions the sufficiency of the evidence to support the finding.

As to the finding in relation to the utility of the highway we need only say that there is evidence tending to prove that it was not of public utility, and this court can not disturb the finding, but the finding is also against the appellant on the question of damages. Under the decision in the case of *Butterworth v. Bartlett*, 50 Ind. 537, the appellant had the right to recover such damages as he might sustain by reason of the vacation of the highway, and if the undisputed evidence shows the appellant to be entitled to damages the motion for a new trial should have been sustained. There seems to be no controversy in the evidence on the question as to whether or not the appellant would be damaged by the vacation of the highway. All of the evidence is to the effect that he would sustain substantial damage by the vacation of the highway. Under the evidence the appellant should have been allowed damage, and the finding of the court disallowing his damages is not supported by any evidence, and is contrary to all of the evidence on that subject.

The court erred in overruling appellant's motion for a new trial, and for this error the judgment must be reversed.

Counsel for the appellant also present the question as to the jurisdiction of the circuit court, contending that there is no right of appeal in a case like the one at bar, when the reviewers have reported against the vacation of a public highway, or against the utility of a public highway, but in this counsel are in error. Counsel cite, in support of their position, the case of *McKee v. Gould*, 108 Ind. 107. The case of *Bowman v. Jobs*, 123 Ind. 44, follows the case in 108 Ind. *supra*, but that case is not in point. The appeal was taken from the order approving the report of the first viewers who had reported against the utility of the proposed highway, and the reasoning in that case does not apply to a case like the one at bar. Here there were two sets of view-

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ers, the first reported in favor and the latter against the vacation of the highway, and an appeal will lie from the final order of the board approving the report of the reviewers in an application to vacate a highway.

The holding in the case of *McKee v. Gould, supra*, is to the effect that, in an application to establish a highway, the viewers must locate the highway, and until viewers have reported favorably to its location, and located and described it, both the board of commissioners and the circuit court are powerless to establish such highway, for the reason that it is the province of the viewers appointed by the board of commissioners to locate and lay out a proposed highway, and this duty can not be exercised by any other persons or tribunal.

In the case of *Bowman v. Jobs, supra*, this doctrine is extended to a case where reviewers have been appointed in an application to establish a highway, and the reviewers reported against the utility, and it is held in such case that the only order that can be made is to dismiss the procedure, and an appeal will not lie, although it is intimated that if there is a refusal to assess damages there may be an appeal; and if an appeal lies for that purpose the case may be tried *de novo*, as to the question of utility. Applications to establish and to vacate highways materially differ. In an application to vacate, the petition must necessarily describe the portion of the highway sought to be vacated, and there are but two questions to try, one the utility, or non-utility, of the highway, and the other the question of damages, if asked for by a remonstrant.

They are both questions for judicial determination, and the judgment of the court itself fixes the status of the parties. Unlike the location of the highway, it is not necessary that viewers be sent out to lay out and describe the particular highway. It is true the statute provides for the appointment of viewers and reviewers, the same as in case of the location, but the simple question they determine is as to

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the utility of the highway ; they are not required to particularly describe and designate what particular part shall be vacated.

It will be noticed from the reading of section 5024, R. S. 1881, that the language relates alone to the location of highways, and not to highways proposed to be vacated.

In this case the first viewers reported in favor of the vacation, and the second viewers against the vacation of the highway, and the board of commissioners approved the last report. This, we think, is such a final judgment that an appeal will lie from it to the circuit court, and the cause is in the circuit court for trial *de novo* ; the questions to be tried in this case being the utility of the road, and, in case of a finding that it is not of public utility, the further question as to amount of damages the remonstrant will sustain, if any, by reason of the vacation thereof, must also be determined.

Judgment reversed, at costs of appellee, with instructions to grant a new trial.

COFFEY, J., dissents from that part of the opinion holding that an appeal will lie to the circuit court.

Filed March 20, 1891.

No. 14,615.

DAVIS v. HUTTON ET AL.

127 481
170 314

DESCENT.—Guardians' Sale of Real Estate.—Widow's Rights.—Valuable Improvements.—A husband, after taking a conveyance of land, became insane. His guardians then sold the land to pay part of the purchase-money due therefor, and other debts of the husband. The proceeds remaining after the payment of the debts and the purchase-money were re-invested in other lands.

Held, that as the special finding shows that the husband was insane, and

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that the land was conveyed by his guardians, it will be presumed that she did not join in the guardians' deed, not being authorized by statute so to do.

Held, also, that the sale of the land to pay the balance of the unpaid purchase price of the land and the other debts due from the husband did not bar the widow's interest in the land upon the death of the husband, and that she was entitled to one-third thereof.

Held, also, that the widow was not entitled to any interest in the increased value of the land occasioned by the valuable and lasting improvements made between the date of the guardians' sale and the death of her husband.

TENANTS IN COMMON.—*Rents and Profits.*—One tenant in common, who occupies the land, is not accountable for rents unless he excludes his co-tenant or receives rent from a third person.

From the Montgomery Circuit Court.

B. T. Ristine, T. H. Ristine, P. S. Kennedy and S. C. Kennedy, for appellant.

A. Thomson and J. West, for appellees.

COFFEY, J.—This was an action by the appellant against the appellees, in the Montgomery Circuit Court, to recover the possession of an undivided interest in certain described land and to quiet title thereto.

Upon proper request the court made a special finding of the facts in the case, and stated its conclusions of law thereon.

It appears from the facts found by the court that Thompson Davis, then the husband of the appellant, on the 9th day of August, 1864, purchased and took a conveyance from Stephen Graves of the land described in the complaint. The land was purchased at the agreed price of \$12,000, Davis paying \$9,000 in cash, and executing his notes to Graves for \$3,000, balance of the purchase-price, secured by mortgage on the land. In the month of October, 1865, Thompson Davis was, by the proper court, declared to be a person of unsound mind, and thereupon Isaac Davis and Jasper Allen were appointed guardians of his person and estate. In the month of January, 1866, the guardians procured an order from the Montgomery Common Pleas Court to sell said land

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for the payment of said sum of \$3,000 and other debts due from Thompson Davis, and to re-invest the remainder of the proceeds of such sale in other land, under which the land was sold and conveyed for the sum of \$12,000, the debts paid and the balance re-invested in other lands. Thompson Davis died intestate on the 19th day of December, 1883, leaving the appellant as his widow. Each of the appellees owns a part of said land, all of which was greatly enhanced in value by permanent and lasting improvements made between the date of the sale by the guardians and the death of Thompson Davis.

Upon these facts the court concluded, as a matter of law, that the appellant, as the widow of Thompson Davis, became entitled to one-third of three fourths of said land upon his death ; and that she was not entitled to any of the increased value occasioned by the permanent and lasting improvements made between the date of the guardians' sale and the death of Davis.

Each of the parties to the suit excepted at the proper time to the conclusions of law as stated by the court, and each assigns such conclusions as error in this court.

The appellees contend that the court erred in its conclusion that the appellant was entitled to an interest in the land :

First. Because it is not found that she did not join in the conveyance.

Second. Because the sale by the guardians to pay part of the purchase-money due for the land barred her right to any part of the same.

Section 2491, R. S. 1881, provides that "A surviving wife is entitled, except as in section 2483 excepted, to one-third of all the real estate of which her husband may have been seized in fee simple at any time during the marriage, and in the conveyance of which she may not have joined, in due form of law."

This statute was in force at the date of the guardians' sale mentioned in the findings of the court.

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While there is no direct finding that the appellant did not join in the conveyance of the land involved in this suit, we think it does, in effect, so find. It is shown by the special finding that her husband was insane, and that the land was conveyed by his guardians. Our attention has not been called to any statute in force at that time, and we know of none, which authorized her to join in the guardians' deed.

There being a total absence of any authority to do so, we must presume she did not join in such deed.

Nor do we think that the sale of the land to pay the balance of the unpaid purchase-price of the land, with other debts due from her husband, barred her interest in the land. It is not shown that she was a party to the petition filed by the guardians for a sale of the land, and her interest could not be affected by a proceeding in court to which she was not a party.

The court did not err in its conclusion that the appellant had an interest in the land involved in this suit.

It is contended by the appellant that the court erred in its conclusions of law:

First. In holding that she was entitled to one-third of three-fourths of the land in controversy, instead of one-third of the whole, and,

Second. In holding that she was not entitled to one-third of the increased value of the land occasioned by the valuable and lasting improvements made between the date of the guardian's sale and the death of her husband.

In our opinion the circuit court erred in holding that the appellant was not entitled to one-third of the whole of the land in controversy. Upon the execution of the deed by Graves to Davis the latter became seized of the entire tract, so that the appellant falls within the letter of the statute. The payment of the balance of the purchase-price by the guardians was the same, in legal effect, as if it had been paid by the husband of the appellant. The appellant's rights, therefore, could not be affected by such pay-

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ment. 1 Washburn Real Property, p. 212; 1 Jones Mortgages, section 585; note, 5 American Decis., p. 234.

The court did not err, however, in holding that she was not entitled to any interest in the increased value of the land occasioned by lasting and valuable improvements made between the date of the guardian's sale and the death of her husband. In England it would be otherwise, but the decided weight of authority, in this country, is that she can take no part of the improvements in question. 1 Washburn Real Property (5th ed.), pp. 298, 299-300; *Gore v. Brazier*, 3 Mass. 544; *Stearns v. Swift*, 8 Pick. 532; *Dunseth v. Bank of the United States*, 6 Ohio, 77; *Hobbs v. Harvey*, 16 Me. 80; *Mosher v. Mosher*, 15 Me. 371; *Rannels v. Washington University*, 96 Mo. 226; *Powell v. Monson, etc., Mfg. Co.*, 3 Mason, 347; *Alleman v. Hawley*, 117 Ind. 532.

The judgment is reversed, with directions to the circuit court to restate its conclusions of law giving to the appellant one-third in value of the land in controversy, deducting the increased value occasioned by the improvements as found by the court.

Filed Jan. 8, 1891.

MOTION TO MODIFY MANDATE.

COFFEY, J.—A petition has been filed in this cause praying the court to modify the mandate heretofore made. It is insisted, as we understand the petition, that the rents and profits accruing from the land, and the taxes paid by the appellees, should be taken into account in fixing the quantity of land to which the appellant is entitled.

There is nothing in the special finding in this case which would authorize the recovery of rents and profits.

One tenant in common, who occupies the land, is not accountable for rents unless he excludes his co-tenant or receives rent from a third person. *Humphries v. Davis*, 100 Ind. 369; *Crane v. Waggoner*, 27 Ind. 52.

Under the finding of the court in this case the appellant

Wolf *et al. v. Zimmerman.*

is entitled to recover as follows: As to the tract held by Trask, valued at \$1,800, with the improvements thereon, one-sixth thereof in value. As to the tract held by Clark, valued, with the improvements thereon, at \$1,200, one-sixth thereof in value. As to the tract held by Drake, valued, with the improvements thereon, at \$1,440, one-sixth thereof in value. As to the tract held by Hutton, valued, with the improvements thereon, at \$8,325, seventy-four three hundred and thirty thirds thereof in value. As the land and the improvements thereon are inseparable, in the event any of the tracts should be sold with a view of dividing the proceeds, such proceeds should be divided in the proportion above stated.

The mandate heretofore made in this cause is hereby modified so as to direct the circuit court to render judgment on the special finding as herein indicated.

Filed March 21, 1891.

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No. 14,658.

WOLF ET AL. v. ZIMMERMAN.

MARRIED WOMAN.—Contract of Suretyship.—Estoppel.—A husband and wife executed a second mortgage upon two parcels of land, one of which was owned by the husband and wife jointly, the other by the husband in severalty, to indemnify the mortgagees against loss as sureties for the husband. To enable the husband and wife to borrow money to discharge the lien of the first mortgage and thereby to avoid a threatened foreclosure, the indemnifying mortgage was released on the agreement of the husband and wife to execute a junior mortgage in place of the released mortgage, and assign to the mortgagees, as collateral security, a note belonging to the wife.

Held, that the wife was the surety of the husband in the entire transaction; that she was entitled to the possession of the note pledged as collateral security, not being estopped to assert her right to the possession, as the mortgagees, with knowledge of the facts, were chargeable with knowledge of the legal consequences.

From the Wabash Circuit Court.

Wolf et al. v. Zimmerman.

M. H. Kidd and N. G. Hunter, for appellants.
A. Hess, for appellee.

ELLIOTT, J.—The appellee asserts that she is the owner of a promissory note executed by David R. Speichen, and that the appellants wrongfully withhold possession of it from her. The controlling questions arise on the answer. The material facts contained in it are these: On the 23d day of July, 1881, the appellee and her husband executed to the appellants a mortgage upon two parcels of land, one of which was owned by the husband and wife jointly, the other by the husband in severalty. This mortgage was executed to indemnify the appellants against loss upon their undertaking as sureties for the husband in a note executed by him. At the time the indemnifying mortgage was executed there were two purchase-money mortgages upon the land, one of these embraced only the tract owned by the husband; the other embraced both tracts. The holders of the purchase-money mortgages pressed for payment of their liens, and the mortgagors sought to avoid foreclosure by borrowing three thousand dollars with which to discharge the lien for the unpaid purchase-money, and this they could not do without securing a release of the indemnifying mortgage executed to the appellants. To induce the appellants to release their mortgage, and enable the appellee and her husband to secure the money needed to pay the purchase-money mortgages, the appellee and her husband agreed to execute a junior mortgage, and to assign the note in controversy to the appellants. The original indemnifying mortgage was released, the money was borrowed, a second indemnifying mortgage was executed, and the note was assigned in due form.

It seems clear that the contract for which the promissory note in controversy stands as a collateral security created an obligation against the husband as principal and that the wife occupies the position of a surety. The indemnifying mortgage in which the wife joined was not for her benefit;

Wolf *et al. v. Zimmerman.*

it secured no debt of hers, nor brought her any money or property. She was not, therefore, bound by that mortgage nor by the promise contained in it, although it was effective against her husband and his property. This indemnifying mortgage was removed, it is true, from all the property, but it was not given to secure the debt of the wife or to benefit her in any manner. At the outset, the debt, or obligation, was unquestionably that of the husband, at no time did it become that of the wife. In joining her husband in executing a mortgage she did not incur a debt as principal; from first to last she occupied the position of a surety. The consideration for the original mortgage moved to the husband alone, and that consideration remained unchanged. The first indemnifying mortgage secured the sureties of the husband, and nothing was done to change the relation of the parties to the original debt. It is true that a wife may join with the husband in conveying or mortgaging his separate property for his debt, but she does not become the principal obligor. The case of *Fitzpatrick v. Papa*, 89 Ind. 17, is not in point, for the reason that the obligation secured by the indemnifying mortgage was not a lien upon the land of the wife, since she could not bind herself to indemnify persons who assumed the obligation of sureties for the debt of the husband. The case of *Warey v. Forst*, 102 Ind. 205, must be regarded as an authority against the appellants, for it was there held that the obligation of a married woman executed to secure the debt of the husband and to prevent threatened litigation, is void. The fact that the husband and wife were tenants by entireties of one of the parcels of land does not add strength to the appellants' case, for land so held can not be mortgaged to secure the obligation of the husband. *Dodge v. Kinzy*, 101 Ind. 102.

The purchase-money mortgages undoubtedly bound both parcels of land, but the appellants neither held those mortgages nor paid any part of them, and hence they can base no rights upon them. All that they did was to consent to

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release a junior mortgage to let in a mortgage to secure a loan to pay the purchase-money mortgages, but the consideration of their mortgage was not changed ; it remained, from first to last, a security for the obligation of the husband. The question is not as to the consideration which induced the appellants to release their indemnifying mortgage and accept another of equal rank, for the question is, whose obligation was secured by the assignment of the promissory note in controversy ?

The wife did not assign the note to secure her own debt, for she owed the appellants no debt. She did not assign the note to make her sureties secure, for no one had undertaken as surety for her. The only obligation secured was that of her husband, and as he was the principal obligor she could occupy no other relation than that of surety.

The question is not whether the wife received a sufficient consideration for her promise, so that the cases of *Wolford v. Powers*, 85 Ind. 294, and *Keller v. Orr*, 106 Ind. 406, are not relevant to the controversy. The question is whether the wife was, or was not, the surety of the husband ? If she was, the contract is void, for so the statute declares. That she was a surety, and not a principal, seems clear.

If it be true that the wife's contract was one of suretyship (and that it is true we think has been demonstrated), then it must follow that the appellants obtained no enforceable contract from her ; and if they obtained no such contract, there was none for which she could pledge her property as collateral security. In other words, if the wife's contract was void there was nothing to secure, and, if nothing to secure, the appellants could not possibly acquire a right to her property. That this is so is evident when it is brought to mind that a void contract can create no rights.

There is no estoppel, for all the facts were known to the appellants, and an estoppel can not exist in such a case as this, where parties have the same knowledge of the material facts. The appellants knew that as a matter of fact the ob-

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ligation was that of the husband, and with this knowledge they were bound to know, as matter of law, that the wife's contract was void. A party who has full knowledge of the facts is chargeable with knowledge of the legal consequences flowing from them. *Dodge v. Pope*, 93 Ind. 480; *Krug v. Davis*, 101 Ind. 75.

Judgment affirmed.

Filed Jan. 9, 1891; petition for a rehearing overruled March 21, 1891.

No. 15,697.

HINKLE v. THE STATE.

CRIMINAL LAW.—Assault and Battery.—Jurisdiction.—Circuit Courts.—The act of March 9, 1889 (Acts 1889, p. 363), which provides that upon conviction of assault and battery, in the courts named in the section, the punishment shall be as therein stated, does not deprive the circuit court of jurisdiction of the offence.

SAME.—Unreasonable Punishment of Child.—Verdict.—Review on Appeal.—On a prosecution of a father for an assault and battery on his child, it appeared that the father chained his fourteen-year-old child to a sewing-machine, and left her thus alone in the house with her infant brother during the day.

Held, that a verdict that the punishment was unreasonable and unlawful, will not be disturbed on appeal.

From the Hamilton Circuit Court.

E. F. Ritter, G. Shirts and M. Vestal, for appellant.

A. G. Smith, Attorney General, *D. W. Patty*, Prosecuting Attorney, *T. J. Kane* and *T. P. Davis*, for the State.

OLDS, C. J.—The appellant was indicted by the grand jury at the November term, 1889, of the Hamilton Circuit Court, for assault and battery upon one Edith Hinkle.

The appellant filed an answer in abatement, challenging the jurisdiction of the circuit court on the ground of the ap-

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pellant being the father of the said Edith Hinkle, and at the time of the alleged assault and battery she was about twelve years of age, and was under the custody of her father, the appellant.

It is contended that in such cases the circuit court has no jurisdiction, the jurisdiction having been conferred on justices of the peace, mayors, police judges, and criminal courts by virtue of section 1, of an act approved March 9, 1889. *Acts of 1889*, p. 363.

A demurrer was filed to this answer and sustained.

In this there was no error. The circuit court has jurisdiction of prosecutions for assault and battery, and the section of the statute referred to does not attempt to deprive the circuit court of such jurisdiction. Indeed said section of the statute does not even confer or attempt to confer jurisdiction of the misdemeanor defined in it on the courts named in the section, but simply provides that upon conviction in such courts the punishment shall be as stated in the section. If the courts named therein do not have jurisdiction of the misdemeanor defined and created independent of the section, it may well be doubted whether such section gives the courts therein named jurisdiction in such prosecutions. If jurisdiction is created by the section it is by mere inference; certainly no jurisdiction of the circuit court is taken or attempted to be taken from it.

The appellant was convicted, and he filed a motion for a new trial, which was overruled, and he excepted and assigns the ruling as error.

The first contention is that the verdict is not sustained by sufficient evidence. We have read and considered the evidence, and we think no good would be accomplished by setting it out in the opinion or by giving a lengthy synopsis of it. It relates to the treatment of a little girl, about twelve years old, by her father fastening her to a sewing-machine by a chain attached to the girl's ankle, and allow-

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ing her to remain chained during the day except at meal times and unloosing her at bedtime.

The fact as to the treatment of the child became known ; the city officers were informed of it, and she was released by them. When found she was thus chained in the house with her little brother about two or three years old, there being no older person at the house, the father (the appellant) was absent at his work, and his wife, the mother of the little boy and the step-mother of the little girl, was at the time absent at a neighbors. It is contended on behalf of the appellant that the child was incorrigible ; that he had punished her in other ways, resulting in no good, and he resorted to this method of punishment to work a reformation in her. If there is evidence tending to support the verdict of the jury, under the long line of decisions of this court we can not disturb it. That there is evidence tending strongly to support the verdict can not be questioned. The father has the right to administer proper and reasonable chastisement to his child without being guilty of an assault and battery, but he has no right to administer unreasonable chastisement or to be guilty of cruel and inhuman treatment of his child, and if he does administer unreasonable chastisement and treats the child cruelly and inhumanly his acts become unlawful, and if they are such as to constitute an assault and battery, he may be prosecuted and convicted.

The law has very wisely left it for the court or jury trying the case to determine whether the chastisement is reasonable and lawful or unreasonable and unlawful, and when they have passed upon the acts and found them to be unwarranted, unreasonable and unlawful, this court will not disturb the verdict or finding if there be evidence to sustain it. And, as we have said, the evidence in this case clearly supports the verdict. Indeed, it is a case in which this court feels more like commanding than condemning the verdict. Parents bringing children into the world owe to them and to the community the duty of caring for and properly

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training them in infancy and curbing the evil tendencies at a time and at an age when it can be done without resorting to excessive punishment and cruel and inhuman treatment, and if the parent neglects the proper training of his child and permits it to go unrestrained until its vicious habits are so fixed as not to yield to reasonable chastisement, it is his duty to adopt some other method for the reformation of his child than brute force and abuse. Indeed, it is questionable whether the latter does not tend rather to engender malice and develop a malignant spirit in a child than an obedient and kindly disposition.

It is next contended that the court erred and was guilty of an abuse of discretion in refusing to allow a change of venue from the county. This motion was submitted on affidavits and counter-affidavits, and we can not say that there was any abuse of discretion.

The mode by which the jury arrived at a verdict, the facts relating to the association and boarding place of a juror during the trial, and that the punishment is excessive, are each set out as causes for a new trial. We have examined these questions and think they constitute no cause for a reversal of the judgment.

Judgment affirmed, with costs.

Filed Feb. 5, 1891; petition for a rehearing overruled March 20, 1891.

14,800.**SCHLOTTER v. THE STATE, EX REL. CROY.**

CONTINUANCE.—Application for Unsupported by Affidavit.—Disregarding of.—

An application for a postponement of a trial on account of the absence of a witness, which is unsupported by the affidavit required by section 410, R. S. 1881, may be properly disregarded.

NEW TRIAL.—Refusal of Application for Continuance.—The refusal of an

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application for a continuance on the ground of the absence of a witness is not cause for a new trial where the facts expected to be proved by the absent witness were proved by another witness as fully as it was possible to prove them.

ARGUMENT OF COUNSEL.—*Misconduct.*—Where the prosecuting attorney, in argument, spoke of a witness for the defendant as “this scoundrel who has served a term in the penitentiary,” there being no evidence to support the charge, he was guilty of misconduct, and the refusal of the court, upon objection made, to attempt to correct it, was reversible error.

From the Noble Circuit Court.

H. G. Zimmerman and F. M. Prickett, for appellant.

N. Prentiss and H. C. Peterson, for appellee.

COFFEY, J.—This was a prosecution for bastardy. A trial of the cause in the circuit court by jury resulted in a verdict for the appellee, upon which the court, over a motion for a new trial, rendered judgment.

The assignment of error calls in question the correctness of the ruling of the circuit court in overruling the motion for a new trial.

It appears by a proper bill of exceptions that when this cause was called the appellant announced his willingness to enter upon the trial of the same. After the jury had been sworn to try the cause the appellant ascertained that one of his witnesses was not present, and, orally, announced that fact to the court, and asked that the cause be postponed in order to enable him to procure the testimony of such witness, but upon an objection made by the prosecuting attorney, the court announced that a postponement would not be granted, and thereupon stated that an attachment would be awarded that the witness might be brought into court before the close of the trial. An attachment for the witness was issued, which was returned before the evidence in the cause was closed.

It appeared by the return of the officer who served the writ of attachment that the witness was sick and unable to attend the court. Appellant did not renew his motion to

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postpone the trial, nor was any affidavit, at any time, filed by the appellant, or by any one on his behalf, showing cause for the continuance or postponement of the trial.

Section 410, R. S. 1881, provides that a motion to postpone the trial on account of the absence of evidence can be made only upon affidavit. If the motion is made on account of an absent witness, the affidavit must show what facts the affiant believes the witness will prove, and that he is unable to prove such facts by any other witness whose testimony can be as readily procured.

The application made by the appellant to postpone the trial, prior to the time the attachment for the witness was issued, was properly disregarded by the court, as it was not supported by affidavit. After the return of the verdict in the cause the appellant, with his motion for a new trial, filed an affidavit in which is set out the facts he expected to prove by the absent witness. It appears by the bill of exceptions on file containing the evidence in the cause, that the appellant had another witness by whom he did prove the facts he expected to prove by the absent witness as fully as it was possible to prove them. We are not advised as to the ground upon which the court announced that the trial would not be postponed on account of the absence of this witness, but we must presume in favor of its ruling. If it was upon the ground that there was a witness present by whom the same facts could be proven, then the ruling was undoubtedly correct.

As the appellant knew of the absence of his witness at the time of the commencement of the trial, and made no proper application to postpone the trial on that account, we do not think he should be heard to say, after taking his chances as to the result, that he was surprised. In our opinion the court did not err in refusing to grant a new trial on the ground of surprise. *Stewart v. Smith*, 111 Ind. 526.

During the argument of the cause counsel for the State, who was the deputy prosecutor, in speaking of one Thomp-

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son, a witness who testified on behalf of the appellant, used the following language :

“ I can not express my contempt for a man twenty-nine years of age that will ask his neighbor’s daughter into one of these holes and have her seduced. This contemptible puke takes her there, within a hundred rods of his wife, and gets her drunk, then says I slander him.”

In speaking of the same witness counsel also used the following language : “ This scoundrel who has served a term in the penitentiary.”

In speaking of all the witnesses called by the appellant, counsel for State used the following language : “ There was not a man on the stand that was capable of proving the character of a decent dog.”

To each of the above expressions the appellant objected, on the ground that the same was improper and not within the evidence, and asked that the counsel be by the court corrected, the remarks stricken out, and that the counsel be ordered to desist from pursuing such remarks, but the court declined to interfere, and the appellant excepted.

In view of the facts developed by the testimony of the relatrix in this case, it would be difficult to restrain counsel in the matter of denouncing the conduct of the appellant and the witness Thompson. We would not reverse this cause on account of the use of any language merely denunciatory of their conduct, but the charge that Thompson had served a term in the penitentiary was something more than mere denunciation ; it was a charge, in no wise connected with his conduct relating to the cause on trial, which may have seriously affected his credibility as a witness in the cause. It is not necessary that we should inquire as to whether proof of the fact that he had served a term in the penitentiary would have been admissible, as affecting his credibility, as no question of the kind is presented by the record. It is sufficient to say that the charge was made by counsel without any proof to support it, and when the objection was made it was error

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for the court to refuse the correction asked. *Rudolph v. Landwerlen*, 92 Ind. 34; *School Town of Rochester v. Shaw*, 100 Ind. 268; *Bessette v. State*, 101 Ind. 85; *Brow v. State*, 103 Ind. 133; *Campbell v. Maher*, 105 Ind. 383; *Nelson v. Welch*, 115 Ind. 270; *Troyer v. State, ex rel.*, 115 Ind. 331. There was no attempt made by the court to correct or remedy this misconduct of counsel at the time objection was made, nor was any such attempt made in the instructions subsequently given.

For this error the judgment must be reversed.

Judgment reversed, with directions to the circuit court to grant a new trial.

McBRIDE, J., took no part in the decision of this cause.

Filed March 31, 1891.

No. 14,859.

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127	497
133	157
127	497
136	430
127	497
148	385

HUSBAND AND WIFE.—Bankruptcy.—Wife's Inchoate Interest.—Where the land of a bankrupt was sold under an order made in the bankruptcy proceeding in 1878, the wife became the owner at the time of the sale of an absolute interest in the land.

SAME.—Estoppel.—Under the then existing laws a married woman could not lose title by estoppel in the lands of her husband.

PARTITION.—Title in Issue.—New Trial as of Right.—Where title is put in issue, in a partition proceeding, and there is an adjudication upon it, a new trial as of right is demandable.

From the Grant Circuit Court.

H. Brownlee and W. H. Carroll, for appellant.

G. W. Harvey and H. J. Paulus, for appellees.

ELLIOTT, J.—The appellees, in their complaint, assert title in fee simple to the land in dispute, and specifically set

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forth the nature of their title. The title which they assert is claimed through Elizabeth Rodgers, deceased, who was the wife of John R. Rodgers. The husband was adjudged a bankrupt, and the property was sold under an order made in the bankruptcy proceedings, on the first day of February, 1878.

It may be said, as well at the outset as elsewhere, that, upon the sale under the order in bankruptcy, the title of the ancestor of the appellees became vested. *Elliott v. Cale*, 113 Ind. 383 (393), and cases cited; *Ketchum v. Schicketanz*, 73 Ind. 137. The wife of the bankrupt, therefore, became the owner of an absolute estate in the land in the year 1878.

The counter-claim of the appellant alleges facts which, it is probable, would constitute an estoppel against one not under legal disability, but which can not be deemed to create an estoppel against a married woman under the law in force when the acts asserted as an estoppel were performed. It has been so often decided that a married woman could not lose title by estoppel in the lands of her husband, under the former laws, that it is almost unnecessary to cite authorities. *Wilhite v. Hamrick*, 92 Ind. 594; *City of Indianapolis v. Patterson*, 112 Ind. 344. There was no error in sustaining appellees' demurrer to the appellant's counter-claim.

A motion for a new trial, as of right, was filed by the appellant and denied by the court. Upon this ruling is presented the only question of difficulty that arises in the case. It is well settled that the title to real estate is not ordinarily in issue in proceedings for partition. *Davis v. Lennen*, 125 Ind. 185, and cases cited. Whatever else may be said of the soundness of many of these decisions, it must be said that it is our duty to adhere to them, as the rule they declare has become a rule of property. But, while the rule stated is a settled one, it is equally well settled that title may be put in issue in partition proceedings. *Isbell v. Stewart*, 125 Ind. 112; *McMahan v. Newcomer*, 82 Ind. 565 and cases cited; *Luntz v. Greve*, 102 Ind. 173; *Thorp v. Hanes*, 107 Ind.

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324; *Spencer v. McGonagle*, 107 Ind. 410; *Woolery v. Grayson*, 110 Ind. 149; *Watson v. Camper*, 119 Ind. 60; *L'Hommedieu v. Cincinnati, etc., R. W. Co.*, 120 Ind. 435. It seems quite clear that the complaint asserts title, for it not only alleges that the appellees are the owners in fee, but it also specifically states facts showing that such is the nature of their title. This was certainly an assertion of title and a challenge to the appellant to join issue upon that question. *Dumont v. Dufore*, 27 Ind. 263; *Indiana, etc., R. W. Co. v. Allen*, 113 Ind. 581; *Rogers v. Beach*, 115 Ind. 413; *Bisel v. Tucker*, 121 Ind. 249, and cases cited. The appellant accepted the issue tendered, and the court decreed that the appellees were the owners in fee, so that there was an issue as to the title and an adjudication upon that issue. The case is, for the reasons stated, not an ordinary one for the partition of lands; if it were, a new trial, as of right, would not be demandable. *Fralich v. Moore*, 123 Ind. 75 (77), and cases cited; *Gullett v. Miller*, 106 Ind. 75. Assuming, upon the strength of what has been said, that title was in issue and that there was an adjudication upon it, the resulting question is, does the fact that in addition to the settlement of the issue of title the right to partition was also asked, preclude the appellant from successfully asking a new trial as of right? Our judgment is that this fact does not destroy his right to a new trial under the statute. We do no more than give effect to our decisions in holding that where title is directly and actually a principal issue in the case a new trial, as of right, must be awarded. *Kreitline v. Franz*, 106 Ind. 359; *Hammann v. Mink*, 99 Ind. 279; *Cooter v. Baston*, 89 Ind. 185; *Physio-Medical College v. Wilkinson*, 89 Ind. 23. The trial court erred in overruling the motion for a new trial as of right.

We have not found it necessary to examine the point made by the appellee that there is no bill of exceptions. Under the decisions in *Physio-Medical College v. Wilkinson*,

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supra; *Cox v. Dill*, 85 Ind. 334; *Stout v. Duncan*, 87 Ind. 383, and *Stanley v. Holliday*, 113 Ind. 525, no bill of exceptions was necessary as the motion was made in term time.

Judgment reversed.

Filed March 31, 1891.

127	500
128	488
127	500
180	473
127	500
183	313
127	500
185	158
136	621
127	500
139	619
197	500
142	549
127	500
145	45
146	442
146	471
127	500
163	458

No. 14,791.

THE CITY OF NEW ALBANY *v.* McCULLOCH.

MUNICIPAL CORPORATION.—Defective Sidewalk.—Personal Injuries.—Pleading.—Complaint.—A complaint against a city to recover for an injury in consequence of a defective sidewalk, which alleges that a sidewalk had been negligently left out of repair and unsafe for use, of which the city had notice for more than a month; that while plaintiff was carefully walking along it in the night-time, it gave way under his weight, by reason of its decayed condition, and he was, without fault on his part, precipitated down an embankment, sustaining injuries, states a cause of action.

SAME.—Failure to Place Signals.—Such complaint is not defective for failing to allege that proper signals of the dangerous condition of the sidewalk were negligently omitted to be placed so as to warn travellers of its dangerous condition.

SAME.—Defence Admissible under General Denial may be Struck Out.—An answer to such complaint, pleaded with the general denial, which alleges that the plaintiff knew the defective condition of the sidewalk, but that, notwithstanding such knowledge, he voluntarily, and of his own free will, ventured to travel on the same, and assumed the risk of his journey thereon, may properly be stricken out, since it alleges only such matters as are admissible under the general denial.

SAME.—Defence.—In such action an answer alleging that the city was indebted up to the constitutional limit, and had no funds available for the repair of its streets and sidewalk, presents no defence, since a city has power under sections 3162, 3164, 3165, R. S. 1881, to repair its streets and sidewalks at the expense of adjacent property-owners.

INSTRUCTIONS TO JURY.—Where it does not appear that all the instructions given are in the record, an objection that the court erred in refusing to give certain instructions asked, is unavailing.

JUROR.—Misconduct of.—*New Trial.*—Misconduct of a juror in separating from the other jurors, after they had retired to deliberate of their ver-

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dict, without the permission of the court, and remaining out of sight of the bailiff and the other jurors for a half hour, when it appears that during such absence he did not communicate with any one in relation to the case or upon any subject connected therewith, is not such misconduct as to authorize a new trial.

From the Floyd Circuit Court.

C. D. Kelso, for appellant.

A. Dowling, for appellee.

COFFEY, J.—This was an action by the appellee against the appellant, instituted in the Floyd Circuit Court, to recover damages on account of personal injuries sustained by the appellee by reason of a defective sidewalk.

The complaint alleges, among other things, that, on the 29th day of January, 1887, a certain street in the city of New Albany, commonly called State street, was much travelled and used by the citizens of said city, and the public generally, as a public highway; that all that part of said street between Cherry street and the line of Monroe street was constructed on an embankment and fill, from twelve to fifteen feet high; that said city constructed, and, for more than ten years immediately preceding said day, had maintained a board walk or pavement on and along the east side of said embankment and fill between said Cherry street and the line of Monroe street, said board walk being intended for the use of, and being used by, foot passengers travelling along said street; that said walk was, by the appellant, negligently allowed to become out of repair, decayed, weak and unsafe for use; that the appellant had notice of the unsafe and decayed condition of the said walk for more than one month before the date first above named, but failed and neglected to improve and repair the same, and make it safe for use and travel; that, on the said 29th day of January, 1887, in the night-time, the appellee was lawfully travelling on said street, and by reason of the weak, decayed and unsafe condition of the said board walk on, over and along which the

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appellee was then and there carefully walking, the same broke and gave way under his weight, and he was, without fault on his part, precipitated down the said embankment, said walk and the timbers thereof falling upon him, by reason of which he suffered certain described serious and permanent injuries.

To this complaint the court overruled a demurrer, and the appellant excepted.

The appellant thereupon filed an answer in three paragraphs. The court, on motion, struck out the second paragraph of the answer, and also sustained a demurrer to the third, and the appellant excepted.

A trial of the cause by jury resulted in a verdict for the appellee, upon which the court, over a motion for a new trial, rendered judgment.

The first question presented for our consideration under the assignment of error relates to the sufficiency of the above complaint.

In our opinion the complaint states a cause of action against the appellant and in favor of the appellee. *City of Lafayette v. Weaver*, 92 Ind. 477; *City of Washington v. Small*, 86 Ind. 462.

In the case last cited it was held that a complaint against a city to recover for an injury in consequence of a defective sidewalk, which alleged that the sidewalk had been negligently left out of repair and dangerous for two months, of which the city had notice; that when walked upon it tipped, because its supports had been washed away, in consequence of which the plaintiff, in passing, without fault, and being ignorant of danger, slipped and fell, sustaining injuries, stated a cause of action. A city is bound to use active vigilance to discover and repair defects in its streets and sidewalks, while the traveller is bound to use ordinary care to avoid injury.

The objection urged by the appellant to this complaint is that it does not contain any allegation that proper signals of

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the dangerous condition of the sidewalk were negligently omitted to be placed so as to warn travellers of its dangerous condition.

Under the case made by the complaint in this case we do not think any such allegation was necessary. The court did not err, in our opinion, in overruling the demurrer of the appellant to the complaint in this cause.

The second paragraph of the answer averred that the appellee knew the defective condition of the sidewalk described in his complaint, and that, notwithstanding such knowledge, he voluntarily, and of his own free will, ventured to travel on the same, and assumed the risk of his journey thereon.

There was no error committed by the court in striking out this answer. All the matters therein averred were admissible under the general denial which was pleaded, and the appellant, for that reason, was not injured by the ruling of the circuit court. *Ketcham v. Brazil, etc., Coal Co.*, 88 Ind. 515; *Boyce v. Graham*, 91 Ind. 420.

The third paragraph of the answer avers that the city of New Albany is a municipal corporation of the State, having a population of less than twenty thousand, as ascertained by the last census taken by the United States; that its fiscal year began on the 1st day of June, 1886, and ended on the 31st day of May, 1887; that its council determined that nine-tenths of one per cent. of the ad valorem tax would be sufficient to raise money enough to meet and discharge all current expenses and obligations that might accrue during that fiscal year; that on the 29th day of January, 1887, and for more than five years previous thereto, the city was indebted, evidenced by bonds, notes and other obligations, theretofore issued and negotiated by it, to an amount of over \$400,000, which indebtedness largely exceeds two per centum of the value of the taxable property of said city; that for more than one month prior to appellee's injury appellant had caused to be expended, and had anticipated, its general purpose funds in improving and maintaining its streets, al-

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leys, bridges, sewers, its fire department, and other departments of municipal government, and for more than one month prior to the 29th day of January, 1887, it had no funds available at its disposal, or within its control, which would have enabled it to repair and replace the sidewalk mentioned in the complaint, and put the same in a safe and passable condition.

Section 1, article 13, of our State Constitution provides that "No political or municipal corporation in this State shall ever become indebted, in any manner or for any purpose, to an amount, in the aggregate exceeding two per centum on the value of the taxable property within such corporation, to be ascertained by the last assessment for State and county taxes previous to the incurring of such indebtedness; and all bonds or obligations, in excess of such amount, given by such corporation, shall be void."

The appellant contends that as it had exhausted its available funds it was excused, by reason of the above constitutional provision, from repairing the sidewalk upon which the appellee was injured.

It was intended by this provision of our Constitution to prevent political or municipal corporations from contracting large debts payable out of general taxes to be collected from the people residing or owning property within the corporate limits. Having this purpose in view the amount of indebtedness which corporations may contract is specifically limited. But assessments for street improvements or street repairs are not general taxes payable by the people generally, but they are made against those whose property is benefited, upon the assumption that the property-owner is benefited in a sum equal to the assessment. The corporation, as such, is not liable for such assessments. Section 3162, R. S. 1881, provides that the common council of a city shall have power to compel the owner or owners of any lot or part of a lot on any street or alley, or upon any part of any street or alley, to repair the sidewalks in front of their respective lots or

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parts of lots; and in case the owner or owners of any lot or part of a lot on any street or alley, or any part thereof, fails or refuses to repair the sidewalks in front of their lots the common council may cause such repairs to be made by the street commissioner, at the cost and expense of the owner or owners of such lot or lots. Under the provisions of sections 3164 and 3165 the costs of such repairs may be collected from the owners of such lots without expense to the city.

In the case of *Quill v. City of Indianapolis*, 124 Ind. 292, it was held that under the provisions of the act of March 8th, 1889, upon the subject of street improvements, bonds or certificates issued in pursuance of the provisions of the act did not create an indebtedness within the inhibition of the constitutional provision we are now considering, as they are payable out of a fund accumulated from assessments made against the property benefited by the improvement. See, also, *Board, etc., v. Fullen*, 111 Ind. 410; *Strieb v. Cox*, 111 Ind. 299; *Board, etc., v. Hill*, 115 Ind. 316; *City of Valparaiso v. Gardner*, 97 Ind. 1.

So in case of repairs, the expense thereof is paid by the adjacent property owner whose real estate is supposed to be benefited in a sum equal to the assessment made for that purpose. A municipal corporation, as such, receives no benefit from the improvement or repair of its streets, but the benefit is said to inure to owners of lots abutting upon the street so improved or repaired.

An examination of the statutes above referred to will disclose the fact that cities in this state are clothed with power to improve and keep in repair their streets and alleys without expense to the city, and where such power exists we do not think it is a defence, when sued for injuries occurring by reason of its neglect to keep the streets in repair, to say it had no funds with which to pay for such repairs. As the streets are improved and kept in repair at the expense of the adjacent property owners, paid by assessments made in pro-

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portion to the benefits received, and not out of the city treasury, debts created for that purpose, to be paid in that mode, do not fall within the evil intended to be prevented by the constitutional provision above set out.

We are of the opinion that the answer under consideration was not sufficient to bar the cause of action set up in the complaint, and that the court did not err in sustaining a demurrer thereto.

The remaining questions in the case relate to the action of the circuit court in overruling the appellant's motion for a new trial.

It is insisted by the appellant that the verdict of the jury is not supported by the evidence in the record, but we think otherwise. The evidence before us abundantly supports the verdict of the jury.

No objection is made to the instructions given by the court, but it is urged that the court erred in refusing to give certain instructions asked by the appellant.

This contention is met by the appellee with the objection that it does not appear that all the instructions given by the court are in the record. This objection seems to be well taken. We have been unable to find any authentic statement of any kind in the record from which it can be inferred, as in *Grubb v. State*, 117 Ind. 277, that all the instructions given by the court to the jury are before us.

In this condition of the record we can not consider the ruling of the circuit court in refusing to give the instructions asked, as they may have been included in those given. *Ford v. Ford*, 110 Ind. 89; *Lehman v. Hawks*, 121 Ind. 541.

Finally, it is contended by the appellant that one of the jurors who tried the cause was guilty of such misconduct as entitles it to a new trial.

It appears, by affidavits on file, that one of the jurors separated from the remaining eleven, after they had retired to deliberate of their verdict, without the permission of the

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court, and remained out of sight of the bailiff and the other jurors for one half hour.

In support of the verdict the appellee filed the affidavit of the juror who absented himself to the effect that during his absence from the other jurors he did not communicate with any one in relation to the case, or upon any subject connected therewith.

Misconduct of a juror, in order to be sufficient to authorize the granting of a new trial, must be gross, and must have resulted in probable injury to the complaining party. *Harrison v. Price*, 22 Ind. 165; *Whelchell v. State*, 23 Ind. 89; *Medler v. State, ex rel.*, 26 Ind. 171; *Carter v. Ford Plate Glass Co.*, 85 Ind. 180.

However reprehensible the conduct of the juror who absented himself from the others may have been, under the showing that he had no communication with any person upon the subject of the case which he was sworn to try, we think it can not be inferred that his absence probably injured the appellant. In the absence of such a showing, we have seen that his misconduct was not sufficient to authorize a new trial.

We are of the opinion that there is no available error in the record.

Judgment affirmed.

Filed March 20, 1891.

No. 14,540.

CARNAHAN ET AL. v. SCHWAB ET AL.

FRAUDULENT CONVEYANCE.—Assignment.—Creditors Preferred by Mortgages Given Them.—Part of Assignment.—A debtor in failing circumstances and contemplating making an assignment of all his property for the benefit of his creditors, may prefer such of his creditors as he sees fit to do so, by executing to them mortgages upon his property to secure their debts;

127	507
130	42
137	507
134	61
134	541
127	507
143	558
127	507
145	606
146	552
127	507
150	619
127	507
155	678

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and if the transaction is in good faith it matters not how short an interval of time there is between the execution of such mortgages and the deed of assignment, so that the former, in point of time, in their execution, precede the latter. Such mortgages do not become a part of the assignment, and are not to be taken in connection with the deed thereof.

From the Noble Circuit Court.

L. W. Welker and H. G. Zimmerman, for appellants.

R. P. Barr and L. H. Wrigley, for appellees.

BERKSHIRE, J.—This is a bill in equity filed by the appellants as creditors of Frederick Schwab, an insolvent, to obtain relief against a certain voluntary assignment made by said Schwab for the benefit of creditors, and against certain mortgages executed by said insolvent, whereby preference is given to certain of his creditors.

The theory of the complainants is that the execution of the assignment and mortgages belonged to one and the same transaction, and are in violation of section 2662, R. S. 1881, that being the first section of the act providing for voluntary assignments.

The preferred creditors, together with the assignee and the said Schwab, were made parties defendant to the bill.

Issue was joined in the main action, and the preferred creditors filed cross-complaints asking judgment upon the evidences of indebtedness held by them, and other affirmative relief.

After issue joined on the various cross-complaints the cause was submitted to the court, with a request for a special finding.

The court afterwards returned a special finding, and to the conclusions of law as announced the appellants saved exceptions, and judgment was rendered for all of the appellees in the main action, and decrees for the preferred creditors as asked for in their cross-complaints.

The appellees have assigned cross-errors, but in view of the conclusion to which we have arrived after considering

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the errors assigned by the appellant, the cross-errors are of no importance.

The circumstances under which cross-errors become influential are fully and properly stated in *Thomas v. Simmons*, 103 Ind. 538.

The appellants assign several errors, but the state of the record is such as to render effectual for our consideration only those which call in question the sufficiency of the different cross-complaints and the correctness of the conclusions of law embraced in the special finding.

The sufficiency of these pleadings was not tested by demurrer in the court below, but is called in question for the first time by the assignment of errors in this court.

We have carefully examined each, and think it sufficient to have withstood a demurrer had it been thus challenged; and have no doubt of its sufficiency challenged as it is for the first time in this court.

The deed of assignment purports on its face to be for all of the insolvent's property, and for the benefit of all of his creditors alike, hence it is not fraudulent in law. *Thompson v. Parker*, 83 Ind. 96; *Cushman v. Gephart*, 97 Ind. 46; *Grubbs v. Morris*, 103 Ind. 166; *Henderson v. Pierce*, 108 Ind. 462; *Redpath v. Tuteviler*, 109 Ind. 248; *Schwab v. Lemon*, 111 Ind. 54; *Grubbs v. King*, 117 Ind. 243.

But the argument for the appellants is that the mortgages in favor of the preferred creditors were made after the insolvent had made up his mind to make an assignment, and approximating so closely to the execution of the deed of assignment that all belong to one common transaction, and hence the legal effect of the deed of assignment should be controlled by the surrounding circumstances. In other words, if the mortgages in favor of the preferred creditors were executed about the time the deed of assignment was executed, and after the insolvent had made up his mind to make an assignment, then the assignment is within the inhibition of the statute, and void. But, as the foregoing

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cases hold, to bring the deed of assignment within the inhibition the preferences must be given in the instrument itself, and even then, as some of the cases hold, if the preferences are not sufficient to cover the entire estate, they may be disregarded, and the assignment upheld.

But it has long been the recognized law of this State that an insolvent debtor may in good faith prefer one or more of his creditors to the exclusion of others, and many times decided by this court since the enactment of the present statute upon the subject of voluntary assignments. *Lord v. Fisher*, 19 Ind. 7; *Wilcoxon v. Annesley*, 23 Ind. 285; *Cushman v. Gephart*, *supra*; *Grubbs v. Morris*, *supra*; *Stix v. Sadler*, 109 Ind. 254; *Gilbert v. McCorkle*, 110 Ind. 215.

When the deed of assignment appears upon its face to have been executed in accordance with the statute, it must stand unless fraudulent in fact. And so with mortgages or other transfers of property by the insolvent debtor to secure favorite creditors in anticipation of insolvency.

The circumstances in which an assignment for the benefit of creditors or a mortgage or transfer of property to secure or pay favorite creditors is enveloped, may always be inquired into for the purpose of ascertaining whether the transaction is in good faith or not, but then the question is one of fact, and not of law. Sections 4920 and 4924, R. S. 1881, and so decided by this court so often that we do not deem it necessary to refer to the cases.

The mortgages to the preferred creditors in the case under consideration were executed on the 20th day of January, 1887, and the deed of assignment on the day next following.

The insolvent having a right to prefer creditors might do so at any time before he executed the deed of assignment; the intervening time between the execution of the mortgages and the deed to his assignee is wholly unimportant, except so far as it might be a circumstance with other circumstances tending to establish fraud in fact.

It has been held by this court that a mortgage may be ex-

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ecuted in good faith to secure a *bona fide* debt, although at the time the mortgagor is insolvent, and contemplates making an assignment, of which the mortgagee has knowledge, and which assignment follows the next day, and may be enforced as a valid lien; that, under such circumstances, the mortgage is not carried into the assignment. *Gilbert v. McCorkle, supra.* That case seems to cover the case here under consideration exactly.

In this case the court finds that the debts of the mortgagees were *bona fide*, and that the mortgages were executed in good faith to secure the same. But if the court had found that the mortgages were executed during the same hour, and immediately preceding the deed of assignment, it would still have been a question of fact as to whether they were good-faith mortgages. To hold otherwise would be to entirely disregard the statute. Section 4924, *supra*.

We think the court did not err in its conclusions of law.

We find no error in the record.

Judgment affirmed, with costs.

McBRIDE, J., took no part in the decision of this case.

Filed Jan. 8, 1891; petition for a rehearing overruled March 31, 1891.

No. 14,932.

GREENWALDT ET AL. v. MAY.

127	511
135	108
127	511
1167	158

EXECUTION.—*Judgment Obtained by Fraud.*—A party who pays a claim and enters into an agreement providing for the dismissal of the action brought on the claim is guilty of a fraud if he subsequently causes witnesses to be subpoenaed and costs to be taxed against his adversary. **SAME.—*Judgment for Costs.***—***Injunction.***—Equity will enjoin the collection of a judgment so obtained before a justice of the peace, as a justice of

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the peace has no authority to review his own judgment on the ground of fraud, and injunction is the only adequate remedy.

From the Noble Circuit Court.

O. L. Ballou, H. G. Zimmerman and F. M. Prickett, for appellants.

P. V. Hoffman, for appellee.

ELLIOTT, J.—The appellee brought this suit to enjoin the collection of an execution issued by a justice of the peace, and obtained a perpetual injunction.

The facts as they appear in the special finding may be thus summarized: The appellee sued out a *capias ad respondendum* against the appellant, on which the latter was arrested and brought before the justice of the peace by whom the writ was issued. Various intermediate steps were taken in the case, but it is not important to notice them in detail. On the 24th day of September, 1887, the appellant paid the claim on which the action wherein the writ was issued was founded, and at that time the appellee agreed to dismiss the action. After the payment of the claim, and after the agreement to dismiss was made, the appellant caused a subpoena to be issued for three witnesses, all members of his own family and residents of a county adjoining the one in which the action was brought. The appellee did not see the justice of the peace until the 5th day of October, 1887, the day prior to the time the cause was set for trial, and the justice of the peace then informed him that the subpoena had been issued, whereupon the appellee informed the justice of the agreement to dismiss the case, and directed him to enter a judgment dismissing it at his, the appellee's, costs. On the 6th day of October the appellant appeared with his witnesses, and, finding that an entry of dismissal had been made, caused the witnesses he had subpoenaed to demand their fees and mileage. The justice taxed fees, mileage and costs, as directed by the appellant. Before the commencement of the present suit the appellee paid all fees and costs except the

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fees and costs of the witnesses just mentioned. The appellant caused the execution which is sought to be enjoined to be issued for the purpose of enforcing collection of the costs and fees taxed after the order of dismissal was entered.

In our opinion the appellee was entitled to the relief awarded him. The judgment for costs was procured by fraud. A party who pays a claim and enters into an agreement providing for a dismissal of the action brought on the claim is guilty of a fraud if he subsequently causes witnesses to be subpœnaed and costs to be taxed against his adversary. *Nealis v. Dicks*, 72 Ind. 374; *Johnson v. Unversaw*, 30 Ind. 435; *Stone v. Lewman*, 28 Ind. 97; *Pearce v. Olney*, 20 Conn. 544; *Chambers v. Robbins*, 28 Conn. 552; *Rogers v. Gwinn*, 21 Iowa, 58; *Hibbard v. Eastman*, 47 N. H. 507. As the judgment for costs was obtained by fraud, equity will enjoin its collection, for the justice of the peace had no authority to review his own judgment on the ground of fraud. A justice of the peace possesses no equity jurisdiction and can not set aside or annul his judgment, except in the mode provided by statute, and the statute does not authorize him to review a judgment. *Ainsworth v. Atkinson*, 14 Ind. 538; *Snell v. Mohan*, 38 Ind. 494; *Richards v. Reed*, 39 Ind. 330; *Doyle v. State, ex rel.*, 61 Ind. 324; *Brown v. Goble*, 97 Ind. 86. The jurisdiction of equity was rightly invoked in this instance for the reasons that there was fraud and that there is no adequate remedy at law. If the original action had been brought in a court invested with jurisdiction to correct or review its own judgments and orders we should have a very different question. Here, however, the appellee could not secure relief before the justice of the peace, and we must adjudge that it can be awarded him by equity, or else we must adjudge that he is remediless. The case of *Martin v. Pifer*, 96 Ind. 245, is not in point, for the reason that in this

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case the judgment was obtained by fraud and was entered after the action had been dismissed.

If there had been a trial in this case a different question would arise, but there was no trial, for the order on which the execution issued was entered after the plaintiff had dismissed his action.

Judgment affirmed.

McBRIDE, J., did not take part in the decision of this case.

Filed April 1, 1891.

14,713.

127 514
152 42
—
127 514
167 256

DURHAM v. HIATT.

STATUTE OF FRAUDS.—*Agreements not to be Performed Within One Year.*—Where by the terms of a contract, it is not to be performed within the year, or where it can not be performed within the year, according to the intent and understanding of the parties, as evidenced by its terms, such contract is within the statute, and an action can not be maintained upon it. The statute of frauds has no application to a contract which may or may not be performed within a year.

SAME.—*Contract.*—*Construction.*—An oral contract whereby the plaintiff was to trade certain land belonging to the defendant for other lands, and to pay the difference in money to be furnished by the defendant, and whereby, when the trades were made, and title to the lands acquired, they were to become partners, to use the land together, sell the timber and sell the land and divide the profits “after paying back to the defendant what he was out,” is not within the statute of frauds prohibiting the bringing of an action on an oral agreement not to be performed within one year.

ARREST OF JUDGMENT.—*Complaint.*—A motion in arrest of judgment will not lie if a complaint contains one good paragraph.

From the Montgomery Circuit Court.

P. S. Kennedy and S. C. Kennedy, for appellant.

J. E. Humphries, M. D. White, W. E. Humphrey and W. M. Reeves, for appellee.

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McBRIDE, J.—This was a suit by appellee to recover of appellant the value of services alleged to have been rendered by appellee under an oral contract, and the only question presented for consideration by this court is, whether or not the contract is within the fifth clause of the first section of the statute of frauds. Section 4904, R. S. 1881.

The first paragraph of the complaint states the contract as follows:

“The above named plaintiff, Harmon Hiatt, complains of the above named defendant, William H. Durham, and says, that in the year 1886 the plaintiff and the defendant made an agreement and contract as follows, viz.: That the plaintiff was to go to the State of Tennessee and take charge of all lands that he might buy in said State, and manage in the sale of all timber on the same, to sell all timber for the purpose to which it was best adapted, such as railroad ties, bridge timber, cooper stuff, and fire wood, and for this service the plaintiff and defendant were to divide the profits of all sales share and share alike. Then, after the timber was removed, the plaintiff was to have the land cut up into small tracts and sell the same to actual settlers, to be planted in fruits and vines and cultivated in tobacco; and if possible get a colony of European fruit and vine growers to buy or lease for twenty years or more all of the lands bought by the plaintiff for the defendant under the contract, and in all land sales, leases or rents the profits were to be equally divided. The said Durham was to furnish all the capital, and the plaintiff was to trade certain property that said Durham owned for the lands, at certain prices, and said Durham was then to furnish the money to pay the difference.” Thus far we quote the complaint.

It is then averred that plaintiff did go to Tennessee, pursuant to the terms of the contract, and did exchange much valuable property belonging to defendant for valuable lands in Tennessee, making very profitable exchanges, and also bought certain tracts of land under the contract, alleging

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that he thereby acquired for defendant title to over 30,000 acres of valuable land. It is further averred that a part of defendant's property thus exchanged was a nail factory at Greencastle, Indiana, said to be valued at \$75,000, which plaintiff exchanged for 23,000 acres of land, and that while said trade was made under said contract there was, as to this particular trade, the additional agreement that defendant should pay plaintiff five thousand dollars for making the same.

It is further averred that plaintiff spent seven months making said trades, and buying said land, and that defendant waited until said trades were all made, and then refused to carry them out, or furnish the money to complete the same, and that plaintiff's services were of the value of \$5,000, etc.

The second paragraph states the following as constituting the contract:

"That in the year 1886 the defendant employed the plaintiff to purchase and trade for 35,592 acres of land in the State of Tennessee; that plaintiff was to trade the property belonging to defendant for said land, and to pay the difference in money; that defendant owned one nail factory at Greencastle, Indiana, which he valued at \$75,000, and $\frac{7}{12}$ of a livery stable in the city of Crawfordsville, Indiana, which he valued at \$9,000, and 240 acres of land in Montgomery county, Indiana, valued at \$15,000, and five lots at Indianapolis, Indiana, valued at \$7,200, and one house and lot in the city of Crawfordsville, Indiana, valued at \$1,200; that all of the above property was placed by the defendant in the hands of the plaintiff to trade for lands in the State of Tennessee; that the plaintiff was to have enough money to buy the other lands, and that they were then to become partners and to use the land together, sell the timber and sell the lands and divide the profits together; that the plaintiff was to have full control of said property, cut and sell the timber, and sell the lands and divide the money after paying

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back to defendant what he was out." Plaintiff then avers full performance by him of the contract; that he bought and traded for the 35,592 acres of land; that defendant agreed to all the purchases and trades, and agreed to make all necessary transfers, and furnish all necessary money to complete the transaction; that defendant's money and property thus invested was of the value of \$112,900, for which, by said trades and purchases, he acquired property worth \$213,552, and which was, when this suit was commenced, reasonably worth \$355,920. It is then averred that "it was agreed between the plaintiff and the defendant that plaintiff was to have one-half of all the profits that were made out of said lands; that plaintiff was to take charge of said lands, control the same, sell the timber, rent the lands, and sell the same in small tracts."

There are then some averments as to the character and location of the land, its proximity to shipping points, the character and value of the timber, etc.; that plaintiff spent three months buying and trading for it; that he complied with the contract, and was ready and willing, etc., but that defendant failed and refused to perform, and that plaintiff's services were reasonably worth \$10,000, etc.

We have quoted all the averments of each paragraph which purport to state the contract, or any of its terms, and have given an abstract of the remaining portions of the complaint.

Defendant demurred separately to each paragraph of the complaint, but the demurrers being overruled he failed to save the question by exception.

At the proper time he moved in arrest of judgment. His motion was overruled, and he excepted. He assigns as error:

1st. The complaint does not state facts sufficient to constitute a cause of action.

2d. The court erred in overruling appellant's motion in arrest of judgment.

The first section of the statute of frauds, section 4904, R.

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S. 1881, provides that: "No action shall be brought * * Fifth. Upon any agreement that is not to be performed within one year from the making thereof.

"Unless the promise, contract, or agreement, upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith," etc.

As above stated, the only question presented to this court, and argued by counsel, is whether or not the contract sued on is within the foregoing provision of the statute of frauds.

It is not disputed that the averments of the complaint are sufficient, if an action can be maintained on such a contract as is here pleaded.

Where, by the terms of a contract, it is not to be performed within the year, or where it can not be performed within the year, according to the intent and understanding of the parties, as evidenced by its terms, such contract is within the statute, and an action can not be maintained upon it. *Wilson v. Ray*, 13 Ind. 1.

The law, however, is well settled in this State, that to bring a contract within this clause of the statute of frauds, it must affirmatively appear from its terms that its stipulations are not to be performed within a year after the time of making it. It has no application to a contract which may, or may not, be performed within a year. *Hinkle v. Fisher*, 104 Ind. 84, and cases there cited.

Appellant insists that the terms of the contract in question were such that it could not be performed within a year. That it is evident from its terms that the parties, in making it, had in contemplation a longer period for its execution, and that the court must judicially know that to carry it out in accordance with their obvious intention would require not only one year but a series of years.

While there is certainly much force in their reasoning as applied to the contract as set out in the first paragraph, we can not see that the second paragraph is open to this objec-

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tion. In this paragraph it is averred that defendant employed plaintiff to trade certain property in Indiana for certain property in Tennessee, and to pay the difference in money to be furnished by defendant, and that when the trades were made, and title to the Tennessee lands acquired, they were to become partners, to use the land together, sell the timber and sell the land and divide the profits, "after paying back to appellant what he was out."

The court can not say this could not all have been done within the year. We would not be justified in saying that it affirmatively appears that it was not the intention and understanding of the parties that performance should be complete within that time. Unlike the contract set out in the first paragraph, this contract does not provide for the clearing of the land, its division into small farms, the sale of these farms, or planting them in fruits and vines, or cultivating them in tobacco, or the importation and colonization of European fruit and vine growers to buy or lease the lands for twenty years or more. It may be said with much force of these things, that it was obviously not the intention and understanding of the parties that they should all be done within a year. The averments in that paragraph, however, can not be carried into the second; each paragraph must stand by itself.

It is distinctly averred in the second paragraph that all the trades and purchases were in fact made in three months. We can not say that it was impossible, or improbable, that they should sell in nine months what they had traded for and bought in three months.

We do not decide that the contract set out in the first paragraph is within the statute of frauds. The decision of that question is not necessary to the disposition of this case, but we do decide that the contract set out in the second paragraph is not within the statute, and that paragraph of the complaint is good.

As the question is presented it challenges the sufficiency

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of the complaint as a whole, and if either paragraph is good appellant must fail. *Buskirk Practice*, 172, 264; *Halderman v. Birdsall*, 14 Ind. 304; *Miller v. Billingsly*, 41 Ind. 489; *Kelsey v. Henry*, 48 Ind. 37; *Waugh v. Waugh*, 47 Ind. 580; *Clarkson v. McCarty*, 5 Blackf. 574; *Works Practice*, section 1046; *Baddeley v. Patterson*, 78 Ind. 157; *Sims v. Dame*, 113 Ind. 127.

The judgment is affirmed, with costs.

Filed Jan. 13, 1891; petition for a rehearing overruled April 2, 1891.

127	520
136	607
127	520
138	253
127	520
151	70

14,893.

SCOTT v. HARRIS ET AL.

ADVANCEMENT.—*Presumption.*—*Burden of Proof.*—A voluntary conveyance of land by a parent to a child is presumed to have been intended as an advancement, and the burden of proof is upon the party claiming that it is not.

PARTITION.—*Interlocutory Order.*—*Advancement.*—Where partition is ordered the court can do no more than fix the amount to be charged against a co-tenant as an advancement, and the commissioners make the proper apportionment of the land between the tenants, deducting from the share of a tenant the amount advanced to him.

SAME.—*Rule for Commissioners.*—The commissioners, in making partition, must apportion and set apart to each tenant, by metes and bounds, the portion in value to which he is entitled; and if there be advancements to be taken into consideration, they ascertain the value of the land to be partitioned, together with the advancements to the tenants, and apportion to each tenant his share of the real estate. If, by reason of an advancement, a tenant is not entitled to a part of the real estate, then they apportion it between the other tenants. Their acts are not judicial, but mere computations based on the judgment of partition defining the share of each tenant.

WITNESS.—*Widow.*—*Competent in a Partition Suit of Her Deceased Husband's Land.*—*Effect of Advancement on Her Interest.*—In an action for partition by the heirs of a land-owner, his widow, though a party to the record, is competent to testify to the statements of her husband concerning advancements made to one of the heirs, if no objection is made that such

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statements are confidential and for that reason incompetent. Advancements made by her husband in no way affect her right to one-third of his real estate, and she has no interest in the controversy in relation to such advancements.

From the Wayne Circuit Court.

H. C. Fox and J. F. Robbins, for appellant.

J. F. Kibbey, for appellees.

OLDS, C. J.—John Scott died the owner of certain real estate in Wayne county, and this is an action for the partition of the same between his widow and children, who are parties to the suit. It was sought to charge, and the court did charge, the appellant with an advancement to him of sixty acres of land conveyed to appellant by his father, John Scott, in his lifetime.

The first question presented and discussed is as to whether or not the evidence shows the land to have been an advancement, and we are favored with a learned and interesting argument on behalf of counsel for the appellant as to the definition and nature of an advancement, but what it takes to constitute an advancement is so well understood by the legal profession, and the books are so replete with definitions of an advancement that we regard it unnecessary to go into the question and attempt to formulate a definition which would cast any light upon the question presented. The most important legal principle to be considered in determining the question presented is as to what legal principle applies in weighing the evidence adduced, from which it must be determined whether the land was transferred as a gift, an advancement, or under a bargain and sale by which it was to be paid for at a stipulated amount, and which amount stands as an unliquidated indebtedness against the appellant. If an advancement at all, it remains so regardless of any technical definition that may be given to the word "advancement."

In the case of *Ruch v. Biery*, 110 Ind. 444 (448), the

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rule is stated to be: "A voluntary conveyance of land by a parent to a child is presumed to have been intended as an advancement, and the burden of proof is upon the party claiming it to be anything else." Adhering to this rule the court was justified in holding, under the evidence in this case, that the land conveyed by the father to the appellant was an advancement. It is true the evidence is not very satisfactory, but there is some evidence to sustain the finding of the court, which, together with the presumption in favor of an equal distribution of property, supports the finding that it was an advancement. There is also evidence to sustain the finding as to the amount charged against the appellant. There was some evidence fixing the value of the land at \$3,000, and that appellant had paid \$400 on the same; the deed fixed its value at \$4,800; certainly the appellant can not complain when he is only charged \$2,600.

The next reason urged why the judgment should be reversed relates to the form of interlocutory order for partition.

The interlocutory order and judgment is as follows: "It is, therefore, ordered, considered and adjudged that each of the said plaintiffs, Laura Harris, E. Celeste Bond, Mary Bond and Ionia Bond, is the owner of the undivided two-fifteenths of the real estate described in said complaint, and situate in Wayne county, State of Indiana, to wit: The east half of the northwest quarter of section thirty-two (32), township seventeen (17), range thirteen (13) east, excepting twenty (20) acres out of the southeast corner of said quarter, beginning at the southeast corner of said quarter; thence west forty-one (41) rods and two and one-half (2 $\frac{1}{2}$) links; thence east forty-one (41) rods and four (4) links; thence south seventy-seven (77) rods and twenty-two (22) links, each share of which is enhanced in value by the said advancement to said James A. Scott; that said Martha J. Scott is the owner in fee of the undivided one-third of said real estate, and that said James A. Scott is the owner of the

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undivided two-fifteenths of said real estate, less twenty-six hundred dollars, the amount of said advancement to him. It is further ordered that in making partition of said real estate among said owners that said advancement of twenty-six hundred dollars be considered and charged to said defendant, James A. Scott. It is further ordered and adjudged that Robert A. Howard, John Calloway and Barzilla Clark be and are hereby appointed commissioners to make partition of said real estate, and that in doing so they shall assign and set apart to said defendant, Martha J. Scott, the one-third in value of said real estate to be held by her in severalty; that they shall appraise and ascertain the value of the remaining two-thirds of said real estate, and if the sum of the one-fifth of said value added to the one-fifth of said advancement of twenty-six hundred dollars shall be twenty-six hundred dollars or less, then said commissioners shall exclude said James A. Scott from any share in said real estate, and said commissioners shall assign and set apart to each of said plaintiffs, Laura Harris, E. Celeste Bond, Mary Bond and Ionia Bond, the one-fourth in value of said two-thirds of said real estate to be held by each in severalty. Said James A. Scott shall stand charged with the excess of said advancement to him over the one-fourth value of said real estate. But if said advancement is less than one-fifth in value of the said real estate not assigned to the widow, said commissioners shall assign and set apart to each of said plaintiffs, Laura Harris, Mary Bond, E. Celeste Bond and Ionia Bond, a quantity of said real estate not assigned to the widow, and one-fifth of such advancement, and shall assign to said James A. Scott the same quantity in value less the amount of said advancement, and report their proceedings at the next term of this court."

This is a proper form of a judgment. The court, where partition is ordered, can do no more than fix the amount to be charged against a co-tenant as an advancement, and the commissioners appointed to make the partition make the

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proper apportionment of the land between the tenants, deducting from the share of the tenant the amount advanced to such tenant.

The commissioners, in making partition in any case, apportion and set apart to each tenant by metes and bounds the portion in value to which such tenant is entitled, and when there are advancements to be taken into consideration, they ascertain the value of the land to be partitioned, together with the advancements to the tenants, and apportion to each tenant his share of the real estate. If by reason of an advancement a tenant is entitled to no part of the real estate, then they apportion the same between the other tenants.

The act of making the computations and deductions is not a judicial act, but a mere computation, based upon the judgment of the court defining the share in the estate to which each tenant is entitled, and to be charged against any tenant as an advancement. This is the only practical way a partition could be made by commissioners, otherwise the court would have to hear evidence as to the value of the land, and make partition without the aid of commissioners, which is not contemplated by our statute and mode of procedure.

The next and only additional question presented for decision is admitting the deposition and evidence of Martha J. Scott, widow of the deceased, who was a party defendant.

The sole question in controversy relates to the advancement to the appellant. This question in no way affected the rights of the widow. She was entitled to one-third of the real estate sought to be partitioned regardless of whether the land conveyed by her husband in his lifetime, in which conveyance she joined to the appellant, was an advancement or not. While she was a party to the suit she had no interest in the controversy in relation to the advancement and to which her evidence related. The grounds of objection stated to her deposition, and to certain portions of it, were based upon the fact that she was the widow of John Scott, deceased, through whom the parties claim title to the land, and

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is a necessary party to this action, and has an interest in the subject-matter of the suit, and that the specific questions objected to relate to and are concerning matters that occurred prior to the death of the said John Scott.

No objection was made in the court below to the evidence on account of it being confidential communications between the witness and her husband, hence no objection to its competency can be presented in this court on the grounds of confidential communications, and the question here presented is as to whether the evidence was objectionable or not for the other reasons stated.

It is contended that Mrs. Scott was an incompetent witness under section 499, R. S. 1881.

The word "party," as used in this section, has been construed to mean a party to the issue, and not merely a party to the record, and if merely a party to the record it must appear that he has some interest in the suit in common with the party calling him as a witness in order to render him incompetent as a witness. *Spencer v. Robbins*, 106 Ind. 580 (587). This is decisive of the question involved in this case. Mrs. Scott, while a party to the record and to the suit, had no interest in the result of the issue joined as to the question of advancement to the appellant.

There is no error in the record.

Judgment affirmed, with costs.

Filed March 31, 1891.

Weaver v. Shipley et al.

14,750.

127	526
138	106
127	526
141	600

WEAVER v. SHIPLEY ET AL.

LEASE.—Reformation.—Indefinite Description.—Parol Evidence to Complete.

A lease, or contract, for the conveyance of land must, to be enforced, contain a description of the land; and if the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, unless a new description is introduced into the body of such lease, or contract. Such evidence is admissible only in aid of the lease, or contract, not to contradict it, nor to first describe the land, and then to apply the description.

SAME.—“Three-Cornered Tract.”—A lease of a tract of land described as “the three-cornered tract,” in a certain described tract, is void, and the description of such three-cornered tract can not be supplied by parol evidence.

STATUTE OF FRAUDS.—Lease.—Part Performance.—Improvements.—Injunction.—Possession taken under a written lease that does not sufficiently describe the lands leased, and the making of lasting and valuable improvements thereon, are sufficient to take such lease out of the operation of the statute of frauds. If there has been such a part performance of the contract that to refuse a specific performance would work a fraud upon the party seeking it, a court of equity will grant the relief prayed. An injunction also lies, without asking a specific performance, to prohibit the landlord from interfering with the tenant’s use of the land.

SAME.—Sufficient Location of Property.—The practical location of the boundaries of the leased premises by the landlord pointing them out, coupled with a subsequent possession of the same by the tenant, by and with the consent of the landlord, is a sufficient location of the property.

SPECIAL FINDING.—No Request.—A special finding made by the court without a request by one of the parties will be treated only as a general finding.

EVIDENCE.—Lease.—Executed Copy Admissible without Accounting for Original.—A lease was duly executed by the parties. Some time afterward one of the parties had a copy made, and both parties then signed such copy. This copy, in an action to reform the lease, was attached to the complaint as an exhibit.

Held, that it was admissible in evidence without first showing the loss of the original lease.

SAME.—In an action to reform the description in a lease, the statements of the parties while negotiating the lease, are admissible to locate the land and the terms upon which it was let.

INJUNCTION.—Lease of Land for Tile Mill.—Use of Clay.—Evidence of Inability to Procure Clay Elsewhere.—A. leased three certain tracts of land of B.,

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one of which was insufficiently described in the lease, and from which tract A. had the right to take clay for tile. After he had taken out considerable clay for tile, B. threatened to enter on the insufficiently described tract, and he forbade A. to take any more clay. A. brought an action for an injunction to restrain B.'s interference with him in taking clay from such tract, alleging that he had erected valuable buildings upon the two other leased tracts, relying upon his right to take such clay, and that no other clay could be procured in that vicinity.

Held, that he was entitled to an injunction as prayed, and that evidence was admissible to show that no other clay could be procured in that vicinity.

From the Tippecanoe Circuit Court.

J. R. Coffroth, J. H. Adams and T. H. Stuart, for appellant.

W. D. Wallace and S. P. Baird, for appellees.

MILLER, J.—The appellees commenced this action to enjoin the appellant, Elmore Weaver, and one Bahlah W. Weaver from interfering with certain premises which it was alleged the appellees and one Underhill had leased from said Bahlah W. Weaver.

The defendants answered by a general denial. There was a trial by the court and finding against the appellant, Elmore Weaver, and judgment rendered against him enjoining him from interfering with the leased premises and for one hundred dollars damages, and in favor of Bahlah W. Weaver for his costs.

The appellant, Elmore Weaver, assigns errors as follows:

1. Because the court erred in overruling his separate demurrer to the amended complaint.
2. Because the court erred in its conclusions of law, and each of them.
3. Because the court erred in overruling his motion for a new trial.
4. Because the court erred in overruling his motion to modify the judgment.

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5. Because the court erred in overruling his motion in arrest of judgment.

6. Because the amended complaint does not state facts sufficient to constitute a cause of action against him.

The material allegations of the complaint are, omitting descriptions and formal parts, that on the first day of March, 1883, the plaintiffs and defendant Underhill were desirous of procuring ground upon which to erect a tile mill for the manufacture of tile, and from which to obtain clay to be used in such manufacture; that on that day they applied to the defendant, Bahlah W. Weaver, who was the owner of the real estate, to lease the same for that purpose; that on said day the plaintiffs and Underhill, and the defendant, Bahlah W. Weaver, entered into an agreement whereby said Bahlah agreed to, and did, lease to them for the term of ten years, for the purposes aforesaid, three several tracts of real estate lying adjoining and contiguous to each other, for which they were to pay him as rent seventy-five dollars per year in tile, at the market price; that at and prior to the making of said lease, the plaintiff and said Weaver went upon and over the three tracts of land so leased and mutually pointed out and agreed upon the location of the same; that it was agreed, as a part of the contract, that the plaintiffs were to have all the clay suitable for tile upon the three-cornered tract which they might use during the terms of the lease, and, if they needed it, all the clay on all the tracts of land, but they were to use and occupy no more of the land or clay than they needed for use during the term of the lease; that after they had agreed upon the terms of said lease, and had pointed out and agreed upon, and located by actual view the three tracts of land, they attempted to reduce said contract of lease to writing, and attempted to describe therein the said land leased to them, and that they did sign and execute a written agreement of lease in which they attempted to describe, and thought they had sufficiently described, each of the tracts of land so pointed out, located,

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agreed upon, and leased as aforesaid ; which written contract is in the words and figures following, to wit :

“ March the first, 1883. Article of agreement made and entered into between B. W. Weaver and James Shipley, Allen Shipley and William Underhill, to wit: B. W. Weaver agrees to rent to the parties of the second part ground to set a tile mill, and shedding, and kiln, not to exceed four (4) acres of ground, it being in the northwest corner of the northeast quarter of the east southeast quarter of section twenty-seven (27), town. twenty-four (24), range three (3) west; also, a strip of land ten feet wide, on the west side of the east line running north and south, for the purpose of making tile, it being the east side of the northwest quarter of the southeast quarter, section twenty-seven (27), town. twenty-four (24), range three (3) west; also, a three-cornered piece in the northeast corner of the last described land, and to have all the clay they want for tile in the three-cornered piece, keeping south line parallel with the congressional survey of the land; and also one house, and stable, and garden, and smokehouse, the last described property in the southwest corner of the northeast quarter, section twenty-seven (27), town. twenty-four (24), range three (3) west; this lease is to run ten years from date; the parties of the second part agree to pay the party of the first part seventy-five dollars annually in tile, at the market price, of such tile at the kiln, as the party of the first part may choose. If the parties of the second part failing to pay the amount, forfeit all rights to the above named premises, and the parties of the second part want a way out to the east road of the woods pasture, they must hang a good and substantial gate, and keep the same shut.

“ B. W. WEAVER,
“ JAMES SHIPLEY,
“ ALLEN J. SHIPLEY,
“ WM. UNDERHILL.”

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That immediately after the making of said contract, and the execution of said lease, and in pursuance thereof, they entered upon and took possession of all said real estate pointed out, and relying upon said contract and their ability to hold all of said lands for the term agreed upon, they, with the knowledge and consent of said Weaver, proceeded to and did erect various buildings of a permanent nature particularly described, and also constructed a barb-wire fence around the tract, costing in the aggregate in the neighborhood of \$2,700; that after the erection of said mill and other buildings, and during the year 1883, the plaintiffs began to make and ever since have made and sold large quantities of tile, and with the knowledge and consent of said Bahlah W. Weaver they entered upon the three-cornered tract and have ever since continued to take clay therefrom, and use the same in the construction of tile, with the knowledge and consent of Bahlah W. Weaver and Elmore Weaver; that they have only removed the clay from a half acre of said three-cornered piece; that last fall Bahlah W. for the first time intimated that the plaintiffs had no right to remove clay from the so-called three-cornered piece of land, but they continued without molestation to remove clay therefrom until the close of the tile season; that Elmore Weaver claims to have purchased, in February, 1887, from Bahlah W. twenty acres of land, covering and including the so-called three-cornered tract of land, and since that time he and the defendant, Bahlah, have forbidden the plaintiffs from removing clay therefrom; that Underhill has sold and assigned his interest in the contract and lease to the plaintiffs; that Elmore Weaver, who is the son of Bahlah W., and had full knowledge of the making of the contract and lease at the time of the execution thereof, and of the exact location of said three-cornered tract, and knew where the same was located and agreed upon by the parties, and had full knowledge of the improvements, and that they had made the same on the faith of said contract and lease, and full

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knowledge of the fact that it was absolutely necessary for them to have this tract in order to carry on their tile business at the time he purchased the land; that the plaintiffs have no other place from which to obtain clay for their tile mill, and that they can not in that neighborhood procure any other place from which to obtain the same, and that unless they can obtain said clay their contract of lease will become wholly valueless and their tile mill and improvements will be wholly lost; that their lease has six years to run, and there is an abundance of clay on the three-cornered piece to last during the time it has to run; that the defendant, Elmore Weaver, forbade the plaintiffs from entering on said three-cornered piece of land, or removing clay therefrom, and tore down the gate and bridge-way which the plaintiffs had constructed for the purpose of driving to said tract of land, and set fire to the bridge, and that he now threatens that he will by force and violence keep the plaintiffs away from said tract, and from removing clay therefrom, and that the defendants, Weaver and Weaver, are by force and threats of personal violence preventing the plaintiffs from entering upon or removing clay from said tract, and will continue to do so unless enjoined by this court, to their irreparable damage; that the plaintiffs have fully complied with all the agreements and stipulations on their part, and have promptly and fully paid their rent as stipulated for in said lease, and that they have been damaged in the sum of \$2,000. The prayer is for damages and an injunction.

The objection to the sufficiency of the complaint pointed out by the appellant is that the description of the land leased from Bahlah W. Weaver, as set out in the written lease, is so indefinite and uncertain as to render the contract void.

More fully stated, the position of the appellant is:

1. That the lease is void because there is no description of the land proposed to be leased, and that this defect can not be supplied by parol evidence, and in support of their position they cite *Dingman v. Kelly*, 7 Ind. 717, *Howell v.*

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Zerber, 26 Ind. 214, *Pulse v. Miller*, 81 Ind. 190, *Baldwin v. Kerlin*, 46 Ind. 426, and *Miller v. Campbell*, 52 Ind. 125.

2. That the lessee, having taken possession by virtue of the written agreement, he became a tenant by virtue of his act, and such tenancy is from year to year. *Railsback v. Walke*, 81 Ind. 409; *Friedhoff v. Smith*, 13 Neb. 5; *Vinz v. Beatty*, 61 Wis. 645.

3. That as to the "three-cornered" tract, the lease being void, the right to take clay was a mere license, not assignable, and revocable at pleasure. *Armstrong v. Lawson*, 73 Ind. 498.

The authorities cited establish the proposition that a lease or contract for the conveyance of land must, to be enforced, contain a description of the land; that where the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract; but that courts never permit parol evidence to be given, first to describe the land, and then to apply the description; nor to contradict the written agreement, but only in aid of it. *Baldwin v. Kerlin, supra*.

Tested by this rule the description of the "three-cornered" tract of land seems to be so deficient as to require an entirely new description to identify the land, and this can not be furnished by parol evidence, as it would be substantially the making of a new contract by parol, which is forbidden by the statute of frauds.

If this suit was an action to enforce a contract entirely executory in its character, the authorities cited would be conclusive against the appellee. It remains, therefore, to inquire as to the effect of the partial performance set out in the complaint and proven on the trial.

The complaint proceeds upon the theory that the parties made a parol contract for the lease of the lands for the period of ten years; that the land to be let was identified and pointed out, and all the terms and stipulations of the contract

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fully understood and agreed to, and that afterwards the parties undertook to reduce their agreement to writing, but failed to sufficiently describe the land, and that, therefore, the contract, resting partly in writing and partly by parol, was in law a parol contract (*Pulse v. Miller, supra*; *Board, etc., v. Shipley*, 77 Ind. 553), and as such parol contract it was taken out of the operation of the statute of frauds by part performance.

The right, in a proper case, to enforce such a contract is impliedly admitted in *Railsback v. Walke, supra*.

In Pomeroy Spec. Perf., section 101, it is said: "As the statute speaks of lands, 'or any interest in or concerning them,' contracts to lease are both included within its terms, and are capable of being part performed so as to be taken out of the operation of the statute."

The case of *Fery v. Pfeiffer*, 18 Wis. 535, is much in point, where an agreement for a lease was taken out of the operation of the statute by partial performance; also, *Seaman v. Aschermann*, 515 Wis. 678; *Wallace v. Scoggins*, 17 Ore. 476; *Morrison v. Herrick*, 130 Ill. 631; *Martin v. Patterson*, 27 S. C. 621.

In the language of BERKSHIRE, J., in *Swales v. Jackson*, 126 Ind. 282, the appellees having "entered into possession of the real estate under the contract, and having made lasting and valuable improvements, it would be inequitable and a fraud to withhold the title."

In Wood Landlord and Tenant, section 200, it is said that "A court of equity will decree a specific performance of such contracts, notwithstanding the statute of frauds, when there has been such a part performance of the agreement that to refuse it would work a fraud upon the party seeking its specific execution."

The only infirmity in the written lease is its failure to sufficiently describe the leased premises. We are informed by the complaint that the premises were pointed out and agreed upon at, and prior to, the making of the contract,

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and that soon after the appellees took possession of the same and made lasting and valuable improvements, such as they would not have made had they not relied upon the agreement to hold the same for the full period of ten years.

The agreement as to the boundaries of the leased land and its occupancy for four years, with the knowledge and consent of the landlord, is an important element in the partial performance relied upon, for it furnishes clear and satisfactory evidence, in favor of the appellees, upon the only proposition not established by the written instrument.

The misdescription of the leased property would not have furnished the tenants with a defence if they had been sued by the landlord for rent for the time they occupied the property. *Whipple v. Shewalter*, 91 Ind. 114.

The practical location of the boundaries of the leased premises, coupled with the subsequent possession of the same by the tenants by and with the landlord's knowledge and consent, is a sufficient location of the property. *Jackson v. Perrine*, 35 N. J. Law, 137; *Lush v. Druse*, 4 Wend. 313; *Pierce v. Minturn*, 1 Cal. 470; *Richards v. Snider*, 11 Ore. 197.

While the rules of construction to be applied in identifying boundaries in a lease are the same as those applicable to grants in fee, it is common, especially in the leasing of farm lands, to use less accuracy in the description of the premises than in deeds conveying the fee, and where the parties themselves put a practical construction on the contract, and the premises are taken possession of and occupied under the lease by the consent of both parties, it should be sufficient to take the contract out of the operation of the statute, where the only infirmity in the contract is the insufficiency of the description of the lands. The court did not err in overruling the demurrer to the complaint. The court made a special finding of the facts and conclusions of law, but as the record fails to show that it was at the request of either of the parties, it is to be treated as a general finding. *Has-*

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selman v. Allen, 42 Ind. 257; 1 Works Pr., section 804. And consequently the court did not err in its conclusions of law.

The only other points urged in their brief by counsel for the appellant are that the court erred in admitting illegal evidence.

The first relates to the action of the court in permitting the appellees to read in evidence the exhibit purporting to be a copy of the written lease, without first showing the loss of the original. It appears that originally but one copy was executed, but afterward the parties met and drew off a copy of the original, and all the parties signed it; and the copy so made was delivered to the appellees, being the one given in evidence.

The new paper thus made was, to all intents and purposes, a duplicate, and was delivered to the appellees to subserve the purposes of an original instrument. At all events it was a written instrument signed by Bahlah W. Weaver, and admissible against him and his privies in estate.

Objection is also made to the action of the court in permitting witnesses to state what the parties to the lease said to each other prior to the execution of the written agreement which lead to its execution. The portions of the record where these questions and answers are set out have not been pointed out; but if they had been we are unable to see how the court could have held the complaint good, and then prevented the plaintiff from introducing the only class of evidence by which it could be proven.

Lastly, it is said that evidence should not have been received showing that there was no clay in the neighborhood suitable for making tile except in one of the tracts leased. No objection is pointed out except that it was immaterial. The evidence tended directly to establish one of the material allegations of the complaint, and was not only competent but important, to show the condition the appellees were left in by the interference of the appellant; and also to fix the

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damages they were entitled to recover because of the interference with their leased premises.

We find no error in the record.

Therefore, the judgment is affirmed.

Filed March 31, 1891.

127	536
138	117
127	536
138	616

No. 14,594.

**THE GERMANIA LIFE INSURANCE COMPANY OF NEW YORK
v. LUNKENHEIMER.**

INSURANCE.—*Life.*—*False Answers.*—*Agent's Knowledge of Falsity.*— If an applicant for life insurance, in good faith, gives truthful answers to such questions as are asked him, but the agent of the company, whether purposely or not, without the knowledge or consent of the assured, inserts false answers, the wrong is that of the company and not that of the assured; and the company is estopped to contest the validity of a policy issued thereon, although by the terms of such policy such answers and the application containing them are a part of the contract of insurance, and the assured warrants that all answers given are true.

SAME.—*Failure to Read Application Prepared by Agent of Insurer.*—*Reformation of Application.*— An assured, who has fully, truthfully, and in good faith answered all the required questions put to him by the agent of an insurance company, is not guilty of negligence in signing the application when such agent has prepared it, without reading it. It is immaterial whether the agent acted dishonestly or mistakenly. Nor is it necessary to reform such application in order to secure a recovery on the policy.

SAME.—*Pleading not Necessary to Show Company is ForbIDDEN to Set up an Estoppel.*—*Presumption.*— In an action on such an application it is not necessary to allege that the company is, by its charter, estopped to set up the illegal acts of the agent to avoid the policy issued upon such application. If such charter authorizes such a course the company must plead it as a defence. There is no presumption that the company's charter contains anything so at variance with settled principles of law.

From the Warrick Circuit Court.

G. Palmer, for appellant.

C. Staser, A. Gilchrist and C. A. De Bruler, for appellee.

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McBRIDE, J.—This was an action by the appellee against the appellant to recover on a life insurance policy for \$5,000 issued by appellant on the life of appellee's husband, Frederick Lunkenheimer.

The policy contained the following clause :

“ This policy is issued, and the same is accepted by the said assured, upon the following express conditions and agreements : That the same shall cease, and be null, void and of no effect ; and that this company shall not be liable for the payment of the sum assured, or any part thereof, but that all premiums previously paid shall be the absolute property of the company, without any account whatever to be rendered therefor, except as hereinafter provided in the fourth condition of this policy :

“ 1st. If the representations made in the application for this policy, upon the faith of which this contract is made, shall be found in any respect untrue.”

The application contained the following :

“ It is hereby declared and agreed that all the statements and answers to the printed questions written above, which, together with this declaration and agreement, constitute an application to the Germania Life Insurance Company of New York for an insurance of five thousand dollars upon the life of Frederick Lunkenheimer are offered to the said company as a consideration of the contract applied for, each of which statements and answers, whether written by his own hand or not, every person whose name is hereto subscribed adopts as his or her own, admits to be material, and warrants to be full, complete and true, and to be the only statements given to the company in reply to its inquiries, and upon which, should the insurance applied for be granted, the company's contract will be founded. And this application is submitted to the said company, with the following express covenants and agreements.” * * *

“ 2. That if the insurance applied for be granted by the company, the policy, if accepted, will be accepted subject to

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all the conditions and stipulations contained in the policy, and that the entire contract contained in the said policy, and in this application, taken together, shall be construed and interpreted as a whole, and in each of its parts and obligations, according to the charter of the said company and the laws of the State of New York, the place of the contract being expressly agreed to be the principal office of the said company in the city of New York."

One of the questions which, by the application, the applicant was required to answer, was the following:

"4-c. Have you applied for an assurance or restoration of a lapsed policy with this or any other company without having led to an assurance or restoration? If so, with which companies? And for what reason did the application not lead to an assurance or restoration?"

This question was answered, "No."

The application was made on the 14th day of April, 1881, and the policy was issued on the 21st day of April, 1881.

On the — day of August, 1880, said Lunkenheimer had applied to the Aetna Life Insurance Company of Hartford, Connecticut, for an assurance upon his life, and his application was rejected before the application was made to appellant upon which the policy in suit was issued.

The answer above quoted was, therefore, untrue, and, *prima facie*, appellant is not liable, as there can be no serious doubt that the question thus propounded and answered was material.

With reference to this answer the complaint contains the averment that the application, in so far as said answer is concerned, "Was not, and is not, the application of Frederick Lunkenheimer or of the plaintiff, but the same was solely the act of the defendant. Said application was entirely prepared and written by one George Bauer, who was at the time the general agent of the defendant in procuring said assurance on said Frederick Lunkenheimer's life. Said application was entirely prepared by said Bauer, and all the

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answers to questions therein were written by said Bauer, or under his dictation. Said Frederick Lunkenheimer at the time said application was prepared and written informed said Bauer, that he, said Frederick, had previously to that time made an application to a life insurance company for a policy upon his life, and that no policy had been issued by said company upon said application. Said Bauer was then fully informed of all matters in relation to said application to said life insurance company, and of the action of said life insurance company upon said application. Said Bauer thereupon prepared said application to defendant, as he claimed it was his duty as said agent to do, and thereupon wrote the answer to the question above set out, or caused it to be written by another agent of defendant as it appears in said application, and assured said Frederick Lunkenheimer that all questions in said application were correctly and properly answered, and that he, as the agent of the defendant, had correctly prepared said application; and thereupon said Frederick Lunkenheimer signed said application upon the assurance of said Bauer that the same was in all things correctly made. * * * The answer in said application, to the question hereinbefore set out, was inserted in said application by said Bauer without the knowledge of said Frederick Lunkenheimer or the plaintiff, and without any collusion or fraud upon the part of either said Frederick Lunkenheimer or the plaintiff."

This presents the only controverted question in the case, appellant insisting that upon the foregoing facts there is no liability.

The question is presented,

1. By demurrer to the complaint, which the court below overruled.
2. By the action of the trial court in overruling a motion by appellant and sustaining a motion by appellee for judgment on a special verdict returned by the jury trying the cause, and

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3. By the overruling by the trial court of a motion for a new trial made by appellant.

There are four assignments of error, but each assignment presents the same question, and a ruling on one determines all.

The special verdict, in so far as it affects this question, finds, in substance, that the application for the insurance was taken by one George G. Bauer, who was at the time general agent for appellant for the southern half of the State of Indiana, and one Samuel I. Loewenstein, who was at that time local agent for appellant at the city of Evansville, both of whom had known the assured for at least fourteen years prior to said time; that on the 13th day of April, 1881, and also on the 14th day of said month, said Bauer personally solicited Lunkenheimer to take a policy with appellant, and that each time Lunkenheimer stated to Bauer that it was no use for him to apply for insurance upon his life, for the reason that he had before that time made application to another insurance company for insurance on his life, and that said application had been rejected; that on both of these occasions Bauer replied that "he need not bother his head about that, and that that was the company's business, and that if he passed successfully an examination by the physician appointed by the defendant, the fact that he had been previously rejected by another company would not prevent his procuring insurance with the defendant." That on the 14th day of April, 1881, and immediately after Lunkenheimer had informed Bauer of his said previous rejection, Bauer and Loewenstein, both being at the office of Lunkenheimer, together filled out the application. Loewenstein writing all the answers, and Bauer standing by him looking at each question and dictating many of the answers without referring either question or answer to Lunkenheimer, and that the question over which this controversy arises was not read to, or in any manner made known to, Lunkenheimer, but that Bauer, looking at the question in the application, told

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Loewenstein to write the answer, "No." That when all this was done said parties, although in the same room, were distant some fourteen feet from Lunkenheimer, who did not then or at any other time have any knowledge of the manner in which said question had been answered ; that he did not read the application nor was it read to him, but by direction of Bauer he signed it in the place indicated by Bauer, who then carried it away with him. They also find that the plaintiff also had no knowledge of the manner in which said question was answered, and that there was no collusion or fraud on the part of either plaintiff or the assured.

Prior to the death of the assured he had paid on said policy five annual premiums amounting to \$1,407.25.

The principles which must control in the decision of this case have been many times recognized and applied by this court, and the cases in which they have been thus applied meet the approval of the court as now constituted.

The application for insurance in this case was prepared by an agent, or by agents, of the appellant. The statement of the application whereby the assured agrees to "adopt as his own, admits to be material, and warrants to be true" all statements and answers therein written, whether written by his own hand or by the hand of another, does not change the relations existing between the parties engaged in the preparation of the application. The avowed object in propounding to an applicant for insurance the questions embraced in the written application is to elicit information which will enable the insurance company to determine intelligently whether or not it can safely accept the risk. When the questions are asked it is the duty of the applicant to answer truthfully, and if he gives a false answer, and the company is deceived thereby, and induced to accept an unsafe risk, there is abundant reason for relieving it from liability because of the deception.

The agent, whether he is called a general or a special agent, who, by authority of an insurance company, solicits one to take a policy of insurance, in taking the application of such

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person stands as the representative of the company in so doing, and as such representative he is authorized to require of the applicant truthful answers to all material questions contained in the application. If the company accept the risk and issue the policy it can not then say to the assured, "The agent represented me only while soliciting your insurance, but when he commenced to write your application he ceased to represent me and became your representative, and as your agent presented the application to me." The courts can not thus give judicial approval to Dr. Jekyll and Mr. Hyde.

As is said in the case of *Commercial Fire Ins. Co. v. Allen*, 1 South. Rep. 202: "Such shifting use of a paid employee finds no sanction in that sturdy morality which should underlie every system of jurisprudence."

If the applicant for insurance, in good faith, gives truthful answers to such questions as are asked him, but the agent, whether purposely or not, but without the knowledge or connivance of the assured, inserts false answers, the wrong is that of the company and not that of the assured. The company will be estopped to attribute wrong to the assured. They are authorized to propound the questions that they may learn the truth. When truthful answers are given to their agent they have acquired a knowledge of the truth, as they are charged with knowledge of the facts thus imparted to him. As long as the assured acts in good faith it is altogether immaterial what the agent's motive may have been for suppressing or perverting the truth. Nor can it be said that the assured, who has fully, frankly, truthfully and in good faith answered all the required questions, is guilty of negligence in signing, without reading, the application which is thereupon prepared by the agent. He is justified in assuming that the agent has with equal good faith truthfully recorded the answers given. He may well say to the company, "You accredited this man to me as your representative and I signed the application thus prepared by him, re-

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lying upon the character which you gave him when you commissioned him to come to me as your agent. If he acted dishonestly in the matter, you and not I must suffer the consequences." There is no necessity for a reformation of the contract. A reformation of a contract may be had when by mutual mistake of the parties, or by mistake of the scrivener, something has been written differing from that which both parties intended should be written, provided the mutual mistake is as to a question of fact.

Here one party to the contract states a truth, while the agent of the other party, pretending to record that truth, deliberately records a falsehood instead. When the principal of the dishonest agent is sued he will not be permitted to escape liability simply because of his own agent's dishonesty. He can not say to the assured: "Because you did not suspect my agent of dishonesty, and carefully read the contract written by him before signing it, your negligence was so gross that it relieves me from liability to account to you, and (as is argued with great earnestness in this case) even creates suspicion of your integrity, and that you were in collusion with my agent to rob me." Nor is it material in this case whether the untruthful answer was thus written from dishonest motives, or merely through mistake. The party whose act it was can not complain that the other party to the contract was guilty of negligence in trusting either his honesty or his accuracy.

We are sustained in the foregoing by the following authorities: *Phenix Ins. Co. v. Allen*, 109 Ind. 273; *Commercial Union Assurance Co. v. State, ex rel.*, 113 Ind. 331; *Geiss v. Franklin Ins. Co.*, 123 Ind. 172; *Indiana Ins. Co. v. Hartwell*, 123 Ind. 177; *Phenix Ins. Co. v. Golden*, 121 Ind. 524; *Rogers v. Phenix Ins. Co.*, 121 Ind. 570; *Phænix Ins. Co. v. Stark*, 120 Ind. 444; *Phenix Ins. Co. v. Pickel*, 119 Ind. 155; *Pickel v. Phenix Ins. Co.*, 119 Ind. 291; *Plumb v. Cattaraugus Co. M. Ins. Co.*, 18 N. Y. 392; *Insurance Co. v. Wilkinson*, 13 Wallace, 222; *Insurance Co. v. Mahone*, 21

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Wallace, 152; *New Jersey M. L. Ins. Co. v. Baker*, 94 U. S. 610; *Wood Fire Ins.* (2d ed.) 426-427; *May Ins.* p. 687; *McArthur v. Home Life Ass'n*, 73 Iowa, 336; *Mowry v. Rosendale*, 74 N. Y. 360; *Dunbar v. Phenix Ins. Co.*, 72 Wis. 492; *Continental Ins. Co. v. Pearce*, 39 Kan. 396; *Western Assurance Co. v. Rector*, 85 Ky. 294; *Hingston v. Aetna Ins. Co.*, 42 Iowa, 46; *Bartholomew v. Merchants' Ins. Co.*, 96 Am. Dec. 65; *Bennett v. Agricultural Ins. Co.*, 106 N. Y. 243; *Miller v. Phoenix Mut. Life Ins. Co.*, 107 N. Y. 292, and a large number of other cases that might be cited.

Appellant insists that the complaint is bad, because the application which was made a part of the complaint required that the contract should be construed according to the charter of the company, and that the plaintiff should allege and prove that the charter contained nothing to preclude the appellee from setting up the estoppel growing out of the acts of appellant's agent.

It will not be presumed that the charter of appellant contains anything so at variance with settled principles of law, but if it does, and if appellant could avail itself thereof in an action of this character, it must be done by answer.

It is said that the contract is, by its terms, a New York contract, and to be interpreted and governed by the laws of that State. The complaint set out the law of New York as applicable to the facts of the case, and the jury found the same as a part of the special verdict. The law thus found, as the law of the case, is in accordance with the law of this State as hereinbefore declared.

Appellant insists, also, that the special verdict does not cover the material averments of the complaint, in this, that instead of finding that the question which, it is alleged, was answered untruthfully, was propounded to the assured and answered by him, it finds that prior to the preparation of the application, but on the same day, the assured informed appellant's said agent of his previous application and rejec-

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tion, and had also done so on the preceding day, and that for that reason the judgment was erroneous.

The answer as recorded, if the answer of the assured, would be material and would avoid the policy because of its falsity, and because the falsehood would constitute a breach of the warranty of the truth of appellant's answer. It would be material because a denial of an important fact of which appellant had a right to be informed. If, however, the assured did not deny such a fact, but disclosed it to said agent before the preparation of the application, and said agent thereupon prepared the application with full knowledge thereof, it is altogether immaterial whether the information was imparted in answer to that precise question or not.

The material fact is, did the assured disclose the truth at or before the making of the application, or did he deceive appellant with a falsehood? The precise formula of words used, or the precise hour of the disclosure, is not material.

We find no error in the record, and the judgment is affirmed with costs.

Filed March 19, 1891.

No. 14,894.

**THE LOUISVILLE, NEW ALBANY AND CHICAGO RAILWAY
COMPANY v. RUSH.**

DAMAGES.—Child.—Parent's Right to Recover for Loss of Services.—Kindness and Attention to Family.—In an action by a father for the death of his child it is not error to instruct the jury that in estimating his damages they may consider the condition of his family at the time of the accident, take into account all the services the child might reasonably have performed in the family until it attained its majority, including actual labor in helping to carry on the household affairs, the pecuniary acts of kindness and attention which might reasonably be anticipated that it would have performed which would administer to the family's comfort as

127	545
157	431
127	545
162	653
162	667

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well as their necessities, if accompanied by the statement that they can not consider the fact that the father has been deprived of the happiness, comfort and society of his child, nor acts of affection simply and loss of companionship, and that the recovery is limited by law to the actual pecuniary loss.

PRACTICE.—*Objections to Question.*—Only objections raised in the trial court to a question put to a witness will be considered in the Supreme Court; and other grounds for the exclusion of such a question will not there be available.

NEGLIGENCE.—*Contributory.—Crossing Track.—Approaching Train Obscured by Cars Standing on Side-Track.*—A child seven years of age attempting to cross a railroad track at a street crossing, when a train standing on such crossing is so moved as to give a clear passage way, is not guilty of such contributory negligence as will defeat a recovery by its father, if another train on an opposite and parallel track, and only a few feet from the first track, unseen by the child, suddenly strikes and injures such child in attempting to cross the second track, when if it had remained standing between the tracks it would have escaped injury.

From the Carroll Circuit Court.

C. C. Matson and E. C. Field, for appellant.

E. P. Hammond, W. B. Austin, C. R. Pollard and R. C. Pollard, for appellee.

OLDS, C. J.—On the 21st day of September, 1887, the appellee's daughter, then nearly seven years of age, was struck and killed by appellant's train of cars, at Monon, Indiana. The appellee brought this suit, and recovered a judgment for damages. From this judgment the appellant appeals, assigns, and discusses three alleged errors. The first is that the court erred in giving the following instructions to the jury :

“ In estimating the plaintiff's damages the jury may consider the condition of his family at the time of the alleged accident, and take into account all the services that his child, alleged to have been killed, might reasonably have performed in his family until she attained her majority, and such services may include actual labor in helping to carry on the household affairs, and the pecuniary value of all acts of kindness and attention which might reasonably be anticipated

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that she would have performed for the plaintiff and his family, until her majority, that would administer to their comfort, as well as to their necessities; but the jury should not consider acts of affection, simply, and loss of companionship. The recovery is limited by the law to the actual pecuniary loss."

The court, at the request of the appellant, also gave to the jury another instruction upon the same subject, which must be considered in connection with the one complained of. The additional instruction given reads as follows:

"In any form of verdict you may adopt you are required to state in writing such sum of money as you assess the plaintiff's damages at in the event that he may, under the law, be entitled to recover under the facts as found by you. I, therefore, instruct you that in estimating and considering the amount of such damages you can only take into consideration the pecuniary injury, if any, that the plaintiff has sustained by the loss of services of the deceased from the time of her death until she would have reached the age of twenty-one years, if she had lived. In other words, the proper measure of damages is the pecuniary value of the child's services from the time of her death until she would have attained her majority, taken in connection with her prospects in life, less her support and maintenance. You are not at liberty to consider the fact, if it be a fact, that the plaintiff has been deprived of the happiness, comfort and society of his daughter, nor can you consider any physical or mental suffering or pain which may have been incurred by the plaintiff or his family, or the deceased child, by reason of the injuries described in the complaint. You are simply to estimate the value of the child's services to the plaintiff from the time of her death until she would have attained her majority, less the cost of her support and maintenance, including clothing, boarding, schooling and medical attendance."

The instruction given by the court, on its own motion,

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when read in connection with the other instruction given, we do not think is erroneous.

It is urged that the jury has no right to take into consideration the condition of appellee's family in estimating his damages.

The appellee is entitled to recover for the pecuniary loss sustained on account of the death of the child. It is the pecuniary loss sustained by the father that the jury have to estimate and fix a value upon. The jury can not rationally estimate and determine the amount of this loss without considering the condition of the appellee's family with respect to and use for the child. This was what the jury were considering, and the instruction, taken in connection with the other instruction on the same subject, did not infer that the condition of the family should be taken into account except in relation to and bearing upon the value of the child's services.

The conditions of appellee's family might have been such that the services of the child would be of no value to him, or they might have been such as to have been very valuable.

In the case of *Citizens Street R. W. Co. v. Twiname*, 121 Ind. 375, the wife of the appellee was engaged in managing a millinery business for her husband without charge to him, and it was held that it was proper to admit evidence of the value of the services of the wife in the capacity in which she served her husband; that the husband was entitled to recover for the damages sustained on account of the loss of the services of the wife, and the value of her services and loss sustained by reason of her inability to perform them depended on the character and value of the services which she was capable of performing and accustomed to perform for her husband. *Pennsylvania Co. v. Lilly*, 73 Ind. 252.

The instruction also states that the jury may consider "the pecuniary value of all acts of kindness and attention which might reasonably be anticipated that she would have performed for the plaintiff and his family until her majority

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that would administer to their comfort as well as to their necessities."

The jury are expressly told in this instruction that they shall not consider acts of affection simply, and loss of companionship, and this admonition and express prohibition from considering mere acts of affection, companionship, happiness, comfort and society of the child which the appellee has been deprived of by the loss of the child, are repeated and stated more definitely in the other instruction, and they are further told they shall not consider any mental anguish suffered on account of the death of such child.

Under these instructions all that the words "pecuniary value of all acts of kindness and attention" could be understood to apply to, are such acts of kindness and attention as it would be expected a child would render to the members of the appellee's family which would be of some pecuniary value, the nursing of sick members of the family, and other favors and acts rendered, attending to the other children, all may be said to be acts of kindness and attention which are reasonably expected to be performed by a daughter while a member of the family, and they are of value to the father, for, if not performed by her, other help must necessarily be provided to perform them. There was no error in giving this instruction.

The next question presented is in regard to the admission of evidence. The appellee was permitted to ask a witness to state what, in his opinion, would be the value of the services of a girl of ordinary ability, between the ages of twelve and twenty-one years, in performing labor in her own family; also, the same question relating to the ages of seven and twelve years. These questions were objected to and the objection overruled, and they were answered.

It is contended that the witness was asked to express an opinion upon the question the jury was to pass upon, and that a witness could know no more about the value of such

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services than the jurors who were to pass upon and fix the value.

We do not think the question of the incompetency of such evidence on the grounds urged is presented by the record, for the reason that the objection made and stated to each of the questions at the time they were propounded to the witness, as shown by the record, is that the "defendant objected to the question for the reason that the witness has not stated that he was acquainted with the value of the labor of girls of that age."

The questions were not objectionable on the grounds stated, as the witness showed himself to have some knowledge on the subject to which the questions related. To make an objection to a question available, the grounds of the objection must be stated and pointed out to the trial court, and other and different grounds of objection to the evidence from that stated can not be made available for the first time in this court, hence we do not consider the objection urged. *Clanin v. Fagan*, 124 Ind. 304; *Lake Erie, etc., R. W. Co. v. Parker*, 94 Ind. 91.

The next and only other alleged error discussed is that the court erred in overruling appellant's motion for judgment in its behalf on the special verdict.

It is contended that no such facts are found and stated in the verdict as show the appellee and the child to have been without fault and not guilty of contributory negligence.

In the town of Monon the railroad of the appellant crosses Race street, one of the principal streets of the town, and a street much used, at right angles. Race street runs north and south, and the school-house, post-office, churches and all the public buildings lie to the north of the appellant's railroad. The appellee lived south of the railroad, and his child, the daughter that was killed, together with many other children of the same age, and others, crossed said appellant's railroad at Race street in going to and returning from school in the morning, at noon and in the evening. There are two tracks

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crossing Race street. On the day of the injury the little girl of the appellee who was killed was returning home with a number of other children about her age, and two young ladies, from school at noon for her dinner; as they approached the track from the north there was a freight train on the north track standing across Race street headed to the west. They waited for a time when the freight on the north track backed to the east, making it safe for the school children, so far as harm from that train was concerned, to cross the track, which they proceeded to do in great haste. The freight train upon the north track had attached to the engine a number of box cars which excluded from view another freight train standing upon the south track, east of Race street, headed to the east, the rear end of the train being east of the crossing at Race street, the engine being about three hundred feet west of said street, and having attached to it some box cars next to the engine, and some coal cars at the rear end. The box cars of the train on the north track, being higher than the coal cars, excluded from the view of the daughter of the appellee and other children and persons with her the train on the other track, so they had no knowledge of the presence of any train but the one. When that backed out of the way they immediately hastened to cross the tracks, the child of the appellee being a little in advance of the others. As she was crossing the second track she was struck by the rear car of the train on that track which was being run backward at the rate of seven miles per hour, and crossing said Race street without any person being stationed at the street crossing to warn people and school children about to cross of the danger, and without any person stationed on the rear of the train to give warning of the approaching train which was being run backwards.

The company had full knowledge of the use made of the street, and that numerous school children crossed at that time of day; that prior to, and at the date of, the injury, the ap-

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pelée had knowledge of the general running of the trains upon said appellant's road, and across said Race street, but had no knowledge of the running of trains backward across said street, as the train which ran over and killed his daughter was being run ; that he had cautioned his daughter to be careful in crossing said street, to avoid danger. It is further found that appellee's daughter, who was killed, was a bright, intelligent child, seven years of age, and she, with many other school children, had been accustomed to crossing and recrossing the track at said Race street in attending school, and doing errands.

The facts found do not entitle the appellant to a judgment. There was no negligence on the part of the appellee, or the child. The train which was being run backward, and ran over the child, was obscured from the view of the children by reason of the freight train on the track nearer to them ; the train nearer to them backed up off the street, giving an opportunity to them to cross, and was an invitation to them to pass over the crossing, which they attempted to do speedily, and in making the attempt the child of the appellee was run against and killed by the train on the opposite track, which was obstructed from her view. The bell used for signalling the approach of the train was upon the engine at the opposite, or what was then the rear end of the train, and, under the circumstances, was no warning of the approach of cars three hundred feet in advance of the engine. The train on the track nearest to the children, backing off the street crossing, no other train being in view, they had a right to accept such movement as an invitation to cross, which they attempted to do speedily, and in so doing they were run upon by an unexpected train, of the approach of which no proper signal was given ; under the circumstances the failure of the child to stop and look between the tracks was not negligence. The one train having backed and given an opportunity to cross, she had no reason to anticipate that another train, hidden from view, would come upon her, rear

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end in front, to crush her to death. *Louisville, etc., R. W. Co. v. Schmidt*, 126 Ind. 290; *Rauch v. Lloyd*, 31 Pa. St. 358; *Barry v. New York Central, etc., R. R. Co.*, 92 N. Y. 289; *Byrne v. New York Central, etc., R. R. Co.*, 83 N. Y. 620; *Indianapolis, etc., R. W. Co. v. Pitzer*, 109 Ind. 179.

There is no error in the record.

Judgment affirmed, with costs.

Filed March 19, 1891.

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133 43

No. 14,699.

APPLE v. THE BOARD OF COMMISSIONERS OF MARION COUNTY.

WITNESS.—Volunteer Statement.—Cross-Examination.—Where a witness, on direct examination, volunteers a statement not called for, and the statement is allowed to go to the jury without objection, it is not error to permit a cross-examination relative to the volunteer statement.

BRIDGE.—Injuries Caused by Breaking Down of.—Traveller's Knowledge of Defect.—Instruction.—In an action against a county for injuries caused by the breaking down of a bridge, an instruction that if the plaintiff was acquainted with the bridge, and knew the kind of timbers of which it was constructed, and knew how long such timbers had been in the bridge, "the plaintiff is chargeable with knowledge of the tendency of such timbers to decay, incident to age and long use," is erroneous. In approaching a bridge the traveller has a right to assume that the officers charged with its erection and maintenance have done their duty, and that he can pass over it in safety.

SAXE.—Instruction.—In such action an instruction that if the plaintiff knew the kind of timbers of which the bridge was constructed, the length of time they had been in it, that a part of the same kind of timber still remained, and that plaintiff might have reached his destination by travelling another route, the jury might consider the plaintiff's knowledge of such facts in determining whether the bridge was unsafe, and whether the plaintiff had knowledge of its actual condition, is erroneous.

From the Marion Circuit Court.

Apple v. The Board of Commissioners of Marion County.

W. W. Woollen, for appellant.

F. J. Van Vorhis and *W. W. Spencer*, for appellees.

McBRIDE, J.—Appellant filed a claim for \$2,074.85 before the board of commissioners of Marion county, for injuries which he claimed to have sustained in person and property by the breaking down of a certain bridge, which he alleged had been allowed to become unsafe and dangerous by reason of the negligence of appellee.

The board allowed him \$25 and rejected his claim for the balance. He appealed to the circuit court where the case was tried by a jury and a verdict returned for the appellee. The questions presented here arise on the motion for a new trial made by appellant and overruled by the circuit court.

On the trial of the cause the appellant asked one of his witnesses the following question relative to the bridge:

Q. "Did you make a casual examination of it?"

The witness answered: "Nothing more than I passed over the bridge. Some of the parties living in the immediate neighborhood of the bridge complained of the bridge. They thought it was not safe. In fact it became a somewhat general talk in the neighborhood, and I knew it was a bridge that the county would have to build, and I came and notified the commissioners."

On cross-examination of this witness the following questions were asked and answers given:

Q. "I will ask you if you ever heard anybody talk about that bridge out there, that did not consider it unsafe?" A. "I do not know that I ever heard such talk as that. I do not remember of any talk of that kind."

Q. "I understand you by that, that whenever you heard that bridge mentioned or spoken of, it was regarded by them who talked of it as unsafe?" A. "Yes, sir, I never heard it spoken of as a good bridge."

Q. "That is not the question; the question I asked you—I understand you, that whenever you heard that bridge

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spoken of it was regarded by those who talked of it as an unsafe bridge?" A. "Yes, sir."

Appellant objected to the cross-examination and insists that the court erred in permitting it. We think otherwise. The witness, on direct examination, did not content himself with answering the question, but volunteered a statement not called for. Appellant might have disclaimed this and had it stricken out. He did not do so, and the cross-examination was not improper as addressed to the volunteer statement. Having allowed the statement to go to the jury without objection he can not complain that the court allowed cross-examination relative to the same matter.

The court, at the request of the appellant, gave to the jury the following instruction:

"6. The board of commissioners are chargeable with knowledge of the tendency of timbers to decay, and it is incumbent upon the commissioners to use ordinary care in providing against the timbers in a bridge becoming unsafe because of the decay incident to age and long use. They are not bound, however, to do more than use ordinary care and diligence; and if they act with ordinary care and diligence there is no liability."

This instruction stated the law correctly. The court then, of its own motion, gave to the jury the following instruction:

"I have heretofore instructed you that the board of county commissioners are chargeable with the knowledge of the tendency of timbers to decay; and I now charge you that if you find from the evidence in this case that the plaintiff was acquainted with this bridge, and knew the kind of timbers of which it was constructed, and knew how long such timbers (that were in the bridge at the time of the accident) had been in the bridge, then the plaintiff is also chargeable with knowledge of the tendency of such timbers to decay, incident to age and long use."

It may be said that all persons are, in a certain sense,

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chargeable with knowledge of the tendency of timbers to decay as an incident of age and long use, as it may be said all persons are supposed to know of the tendency of water to run down hill. Both are matters of common knowledge.

Boards of county commissioners are, however, charged with certain duties with reference to the construction and maintenance of bridges, which require them to take notice of the tendency to decay in materials composing them in a sense not required of others. Knowing, as they must, in common with all others, of such tendency, the law makes it their duty to use ordinary care and diligence in informing themselves of their condition, and in providing against danger to the travelling public by reason of such tendency to decay.

The traveller is charged with no such duty. As a rule, the traveller, approaching a bridge, has a right to assume that the officers charged with its erection and maintenance have done their duty, and that he can pass over it in safety. Unless he has from some source information of probable defects he is not required to inspect it, provided he is proceeding in the ordinary way and with no unusual load. Acquaintance with the bridge, knowledge of the kind of timbers of which it was constructed, or of the length of time they had been in the bridge, would not necessarily, nor of themselves, be sufficient to charge him with contributory negligence in attempting to cross it. He would have the right to assume that decayed timbers would be removed and defects repaired. If he should find the bridge open for passage, with nothing to indicate danger, he has a right to regard it as an assurance from the board of county commissioners that it is safe for use in the ordinary way and with the ordinary vehicles and loads. *House v. Board, etc.*, 60 Ind. 580; *Board, etc., v. Legg*, 110 Ind. 479; *City of Indianapolis v. Gaston*, 58 Ind. 244; *Town of Elkhart v. Ritter*, 66 Ind. 136; *Patton v. Board, etc.*, 96 Ind. 131;

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Board, etc., v. Brown, 89 Ind. 48; *Vaught v. Board, etc.*, 101 Ind. 123; *Board, etc., v. Dombke*, 94 Ind. 72.

This instruction would have a tendency to mislead the jury, by causing them to measure the conduct of the appellant by the wrong standard. They were correctly instructed that the appellant could not recover if guilty of contributory negligence.

One effect of this instruction would be to place appellant and appellee upon the same level in the minds of the jury with regard to their duties and liabilities, growing out of their assumed knowledge of the tendency of timber to decay. The jury would, from the two instructions taken together, get wrong impressions of what would be contributory negligence on the part of appellant.

While, as we have said, all persons may, in a certain sense, and to a certain extent, be chargeable with knowledge of a tendency of timber to decay, as that fact is a part of the common stock of knowledge, yet that knowledge, as attributed to the officer charged with the duty of building and maintaining bridges is not merely a knowledge that with time comes decay, but his official duty requires him to take special notice of the fitness of material used in such structures, the comparative durability of the various materials used, as well as of the time when by decay or continuous use it is likely to become unsafe.

Failure on the part of the officer to use reasonable diligence in informing himself upon such matters as are necessary to enable him to cause bridges to be constructed of proper material or kept in proper repair, is negligence. It is because of the duty thus resting upon the officer that he is in such cases chargeable with negligence. No such duty resting upon the traveller, his conduct must be measured by a different rule. This instruction is clearly erroneous.

The court, of its own motion, also gave to the jury the following instruction:

“2. You are the exclusive judges of the evidence, the

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credibility of witnesses, and the weight you will give to their testimony. If you believe from the evidence that the plaintiff, Francis M. Apple, knew of the kind of timbers of which the said bridge was constructed, and the length of time they had been in said bridge; that part of the timbers in said bridge had decayed and been removed, and that there still remained in the said bridge timbers of the same kind; and that those travelling over said bridge did not attempt to carry upon their wagons a full load, because of the condition of said bridge; and that the plaintiff might have reached his destination by travelling another route, though longer, then you are entitled to consider said facts (if from the evidence you find them or any of them to be facts), together with all of the other facts and circumstances proven in the case, in determining the question whether or not the said bridge was, on July 25th, 1887, unsafe and dangerous to be travelled over with a heavy loaded wagon; and whether, at said date, the plaintiff had actual knowledge of the actual condition of said bridge. But you are the exclusive judges of what weight you will give, if any, to such evidence, if any, in determining, both the condition of the said bridge and the plaintiff's knowledge thereof."

The court also erred in giving this instruction: The jury are told by it that they are entitled to consider appellant's knowledge of certain facts in determining: 1st. Whether or not the bridge was in fact unsafe and dangerous; and 2d. Whether appellant had knowledge of its actual condition.

While possibly some of said facts might properly be considered in determining appellant's knowledge of the condition of the bridge, we can not understand how any light would be thrown upon his knowledge of its condition by the fact that he might have reached his destination by travelling another route. And how can it possibly be said that appellant's knowledge of any, or of all of said facts, tended to determine whether or not the bridge was in fact safe or unsafe. Assume that appellant knew the kind of timbers of which

Wiley, Trustee, v. Coovert.

the bridge was constructed, the length of time they had been in it, that a part of the timbers had decayed and been removed, and that a part of the same kind of timber still remained, it can not be said that his knowledge of said facts had any tendency to prove that the bridge was or was not dangerous, nor did they have any tendency to prove that appellant knew of its condition at that time. As we have heretofore said, he had a right to assume that the commissioners had done their duty; that all dangerous and decayed timber had been removed and sound timbers substituted, and the bridge kept in safe condition for use.

The judgment is reversed, with instructions to the circuit court to grant a new trial.

Filed April 4, 1891.

No. 14,665.

WILEY, TRUSTEE, v. COOVERT.

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156 556

APPEAL.—Errors Not Affecting Appellant Unavailable.—Mechanic's Lien.—Where a judgment foreclosing a mechanic's lien is rendered against two persons and only one appeals, an objection by such appellant that his co-party had no interest in the property is not available for a reversal of the judgment.

From the Grant Circuit Court.

— *Brownlee, W. H. Carroll* and *F. W. Swersey*, for appellant.
— *Brownlee* and — *Royse*, for appellee.

ELLIOTT, J.—The appellee brought this suit to foreclose a mechanic's lien, and the appellant was made a party to the suit to answer as to his interest in the property. The notice was directed against Maggert, and a decree was entered foreclosing the lien. The appellant, Wiley, alone appeals, for Maggert does not join in the appeal.

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It is suggested, rather than asserted by appellant's counsel, that as there is no evidence that Maggert was the owner this suit must fail. We think that the appellant can not successfully make that point. The appellant has a right to avail himself of all material errors that affect him, but he can not avail himself of errors affecting another party. It is not shown that he was in any wise affected by the alleged failure to prove Maggert's ownership.

Judgment affirmed.

Filed April 4, 1891.

127	560
129	470
127	560
130	390
130	478
127	560
181	162
139	558
127	560
134	8
134	600
136	475
127	560
141	508
127	560
145	673
127	560
151	30
127	560
158	675

No. 14,625.

STEVENS ET AL. v. STEVENS ET AL.

PRACTICE.—Bill of Exceptions.—Long-Hand Manuscript.—The record recited that ninety days were given in which to file a bill of exceptions, after the recital of a prayer for an appeal. Following this was an entry in the transcript that the following bill of exceptions was filed in the clerk's office, in the cause, to wit: "Exhibits A, B, C, D, E, F and G, the same being the evidence introduced upon the trial of the cause." Attached to the transcript, immediately after what purported to be the formal commencement of a bill of exceptions, reciting that the following evidence was introduced, was what appeared to be a portion of the evidence, marked "Exhibit A." With the record, in addition to "Exhibit A," were five disconnected volumes of evidence marked B, C, D, E and F, with a certificate of a stenographer at the close of "Exhibit F" that it is a *verbatim* report of evidence given in the cause, the title of the case being given, and the certificate being duly signed. None of the volumes purporting to contain the evidence were authenticated by the signature of the judge, or otherwise identified, except by the two file marks of the clerk of the circuit court. In that part of the transcript marked "Exhibit N," was a certificate, but unsigned, to the effect that the long-hand manuscript of the stenographer contained all the evidence given in the cause.

Held, that the evidence was not in the record.

SAME.—Test.—The long-hand manuscript of the evidence found with the papers on an appeal must be so incorporated in and identified by a bill

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of exceptions that if a dispute arises whether what purported to be the evidence is in fact it, the court can settle the dispute by the record alone.

SAME.—*Instructions.—Absence of Evidence.*—If the evidence is not in the record, the case will not be reversed on account of an instruction, if, upon any state of the evidence which might have been properly before the jury, the instruction would have been correct. It is sufficient if it is relevant to the issue.

WILL.—Inquest of Insanity.—Effect.—Presumption.—Burden to Overcome.—Degree of Evidence.—It is not error, in a will contest on the ground of the testator's unsoundness of mind, to charge the jury that an inquest finding the testator of unsound mind and placing him under guardianship, which is in force at the time the will is executed, "is *prima facie* evidence of insanity and incapacity on the part of the testator to execute the will in question," and that "it would, therefore, be incumbent on those who seek to establish such will to show by *clear, explicit* and *satisfactory* evidence that the testator had at the time he executed the will such mental capacity and freedom of will and action as are required to render a will legally valid." The italicized words do not render such instruction erroneous.

JURY.—Misconduct.—The decision of the trial court that the jury is not guilty of such misconduct as justifies the granting of a new trial will not, as a rule, be reversed by the Supreme Court.

SAME.—Incompetency of Juror.—Waiver.—By allowing a juror to serve after a disclosure in court of his incompetency, all objections to his competency on that account is waived.

Costs.—Taxation.—Discretion of Trial Court.—In a will contest case the taxation of costs is very much within the discretion of the trial court, and it is not error to allow costs to the party recovering the judgment. Sections 2603, 2604, R. S. 1881.

From the Union Circuit Court.

D. W. McKee, J. W. Connaway and T. D. Evans, for appellants.

R. Conner, H. L. Frost and L. H. Stanford, for appellees.

MILLER, J.—The questions presented by counsel in their brief for our consideration relate exclusively to the action of the court in overruling the motion for a new trial and in overruling a motion to tax costs.

The assignment of errors calls in question some rulings

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of the court upon demurrs to the pleadings, but no argument in support of their position has been submitted.

The motion for a new trial assigns as causes therefor the rulings of the court in admitting incompetent evidence, misconduct of the jury and of the prevailing party, the giving of erroneous instructions and refusal to give proper ones, and the correctness of the evidence to sustain the verdict of the jury.

The appellees contend that the evidence is not properly in the record.

We find following the rendition of the judgment and prayer of appeal to this court these entries:

“And said defendants are given 90 days in which to file and present their bill of exceptions, all of which is finally adjudged and decreed by the court.”

“And be it further remembered that, on the 11th day of February, 1888, the following bill of exceptions was filed in the office of the clerk of the Union Circuit Court in said cause, to wit: Exhibits A, B, C, D, E, F and G, the same being the evidence introduced upon the trial of said cause.”

We also find attached to a volume of what appears to be a portion of the evidence marked “Exhibit A,” immediately after what purports to be the formal commencement of a bill of exceptions, this entry:

“Be it further remembered that at the trial of said cause the contestants and contestees introduced the evidence as hereinafter follows these words, and is as follows, to wit:”

There is also with the record, in addition to “Exhibit A,” five disconnected volumes of evidence, marked “B,” “C,” “D,” “E” and “F,” with a certificate of the stenographer at the close of exhibit “F,” as follows:

“I, Kate P. Johnson, stenographer in the case wherein this evidence was given in case 1533, of the Union Circuit Court, Spencer Stevens *et al.* v. Sampson R. Stevens *et al.*, do hereby certify that this is a long-hand transcript of the

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short-hand report (*verbatim* report) of the evidence in the above entitled cause. This Feb. 11th, 1888.

“KATE P. JOHNSON, *Stenographer.*”

None of the volumes of what purports to be the evidence are authenticated by the signature of the judge, or otherwise identified except by two file-stamps of the clerk of the Union Circuit Court, one of the date of February 11th, 1888, and the other of July 7th, 1888.

The only other entry relating to the evidence is found in the transcript marked “Exhibit N,” and is as follows:

“Be it further remembered, that the evidence as herein set out by the long-hand report from the short-hand taken by said stenographer was all the evidence given in said cause, and that said judgment on the verdict was rendered on the 18th day of November, A. D. 1887, and ninety days' time was given contestees to file bill of exceptions, and that now, this 14th day of February, 1888, comes the said contestees and present and file this, their bill of exceptions, which is signed and sealed, and made a part of the record herein.

“Witness my hand this 14th day of February, 1888.

“_____.”

The bill of exceptions, as it is set forth, is a mere skeleton, and we are left in ignorance of where it begins or ends, unless we are to infer that the entry last above set out is the conclusion of the bill, a portion of which precedes the evidence in “Exhibit A.”

That the evidence was not properly incorporated in the bill of exceptions, so as to make the same a part of the record, has been settled by repeated decisions of this court. *Wagoner v. Wilson*, 108 Ind. 210; *Butler v. Roberts*, 118 Ind. 481; *Doyal v. Landes*, 119 Ind. 479; *Fiscus v. Turner*, 125 Ind. 46; *Patterson v. Churchman*, 122 Ind. 379; *Ohio, etc., R. W. Co. v. Voight*, 122 Ind. 288.

In the latter cause one of the tests for the determination of this question was laid down as follows: “If a dispute were to arise in this cause as to whether what purports to be the

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long-hand manuscript of the evidence, found with the papers, is the manuscript referred to in the bill of exceptions, we would not be able to settle that dispute by the record before us."

What we have said of the condition of this record shows that, tested by this rule, the bill of exceptions is wholly insufficient to bring the evidence into the record.

Without the bill of exceptions no question can be presented on the rulings of the court in the admission or exclusion of evidence. *Mercer v. Corbin*, 117 Ind. 450.

Objection is made to some of the instructions given to the jury.

The instructions given to the jury are quite voluminous, and can not well be set out in this opinion. No attempt was made to reserve the questions of law, as provided by section 630 of our code of practice, and we have found that the evidence was not incorporated in the bill of exceptions. We are, therefore, to examine the instructions under the rule stated in the recent case of *Elkhart, etc., Ass'n v. Houghton*, 103 Ind. 286, as follows:

"It is well settled, also, that where the evidence is not in the record, the judgment will not be reversed on account of an instruction, if, upon any state of the evidence which might properly have been before the jury, the instruction would have been correct. In such a case, it will be presumed that the instruction was applicable to the evidence." See, also, *Weir Plow Co. v. Walmsley*, 110 Ind. 242, and cases cited.

In *Cincinnati, etc., R. R. Co. v. Clifford*, 113 Ind. 460, it is said: "We can not say that the instructions were not proper under a state of facts relevant and material under the pleadings; and we can not, in the absence of the evidence, examine them for any other purpose. It has long been the rule in this State, that if the evidence is not in the record the court will not reverse, if, upon any supposable state of

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facts relevant to the issue, the rulings of the court were right."

In *Kernodle v. Gibson*, 114 Ind. 451, it is said: "All the presumptions are in favor of the correctness of the rulings of the trial court, and these presumptions will be indulged here until they are affirmatively overcome or excluded by the record; for until then such rulings, even though erroneous, will not be available for the reversal of the judgment."

The same language, substantially, was used in the subsequent case of *McClure v. State*, 116 Ind. 169.

It is proper, also, to take into consideration another rule that has been well established by the decisions of this court, and, indeed, is commanded by legislative enactment, that "when it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below," the judgment shall not be reversed in this court.

In *State, ex rel., v. Caldwell*, 115 Ind. 6, and *State ex rel., v. Ruhlman*, 111 Ind. 17, it has been held that where, from the entire evidence, as it appears in the record, it appears that a right conclusion was arrived at by the jury, their verdict will not be disturbed on appeal for or on account of error in any of the instructions given by the court. Thornton Juries, section 204, and cases cited.

It might well be claimed, in the absence of the evidence, that the presumption should be entertained in this court in favor of the action of the trial court, that the jury rendered a true verdict upon the merits of the cause, and that the evidence, if in the record, would show that a correct result had been arrived at, even to the extent of holding, if necessary, that where the instructions given are erroneous under every conceivable state of the evidence, it should be presumed that they were mere abstract propositions of law, having no relation to the case, and causing no injury to the unsuccessful party.

It is, however, not necessary in this case that we should

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hold, and we do not hold, that there may not be cases where an erroneous instruction, even in the absence of the evidence, would not require us to reverse the judgment.

We have carefully examined the instructions given, and find that those complained of, with the exception of the eighteenth, are in substance the same instructions given in *Cline v. Lindsey*, 110 Ind. 337. We can not commend some of the charges, when taken separately, as precedents, but when examined in connection with those given at the request of the appellants we think the errors are not sufficient to call for a reversal of the cause.

The eighteenth instruction presents for our consideration a question that has, so far as we are advised, never been passed upon by this court. It is as follows:

“ 18. If you find from the evidence that William Stevens, the testator, prior to the execution of the will in question, had been duly adjudged by the Union Circuit Court of Indiana, to be a person of unsound mind, and by virtue of such adjudication placed under guardianship, and that such judgment and letters of guardianship were not annulled, but remained in force at the time of the execution of the will in question, such judgment is *prima facie* evidence of insanity, and incapacity, on the part of said William Stevens, to execute the will in question, and it would, therefore, be incumbent on those who seek to establish said will to show by *clear, explicit, and satisfactory* evidence, that the said William Stevens had, at the time he executed said will, such mental capacity and freedom of will and action as are required to render a will legally valid.”

The appellants contend that the statement, that the evidence should be “ *clear, explicit, and satisfactory* ” evidence, was an invasion of the province of the jury to weigh the evidence for themselves. And, on the other hand, the appellees contend that the adjudication fixed the status of the testator as that of a person of unsound mind, and rendered any testamentary disposition of his estate void.

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The only allusion to this question in our reports was by Woods, C. J., in *Redden v. Baker*, 86 Ind. 191, as follows: "In respect to a lunatic's capacity to make a will, a distinction is recognized in some cases, in which it has been held that the inquisition is not conclusive evidence of incapacity in that particular."

It was not necessary, in that case, for the court to pass upon the question, nor is it necessary for us to pass upon it in this case, except in so far as it is involved in discussing the sufficiency of the instruction, there being no cross-assignment of error to bring it before us for decision.

In *Stone v. Damon*, 12 Mass. 504, the court held that a prior inquisition of lunacy was not conclusive of the capacity to make a will, but that the decree was evidence of his insanity, and, like any other evidence of that fact, would throw the burden of proof on the proponent of the will to show that the testator had at the time of the execution of the will recovered his reason.

In *Breed v. Pratt*, 18 Pick. 115, the doctrine of *Stone v. Damon*, *supra*, was affirmed, and it was held by SHAW, C. J., that "It is *prima facie* evidence of insanity, and incapacity to make a will, and therefore it is incumbent on those who would establish the will, to show, beyond reasonable doubt, that the testator had both such mental capacity, and such freedom of will and action, as are requisite to render a will legally valid." While not strictly in point we cite, as bearing upon the general question, *Garnett v. Garnett*, 114 Mass. 379; *Estate of Johnson*, 57 Cal. 529; *Lewis v. Jones*, 50 Barb. 645; 4 Law Quarterly Review, 442; *Southern, etc., v. Laudenbach*, 5 N. Y. Supp. 901.

The only authority cited, and the only one we have been able to find, holding a contrary doctrine is *Rice v. Rice*, 50 Mich. 448, and that case is not strictly in point here, for it appears that the only question properly determined by the inquest was, that the testator was "mentally incompetent to have the charge and management of his property."

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In *Wallace v. Mattice*, 118 Ind. 59, this court sustained an instruction in which the court told the jury, in a case where fraud was charged, that "Fraud is never presumed, but the burden rests upon one charging fraud to make it out by *clear* and *convincing* evidence." We regard this case as decisive of the question under discussion. The terms *clear* and *convincing*, when applied to evidence, being quite as strong as *clear*, *explicit* and *satisfactory*.

One of the causes in the motion for a new trial was for misconduct of one of the jurors. We find from the record that this was submitted to the court upon affidavits and determined against the appellant. We can not, under the settled rule, disturb this finding. *Dill v. Lawrence*, 109 Ind. 564, and cases cited.

It is also charged that Elmer Grove, one of the jurors, had served on the jury in the suit in which the testator was found to be of unsound mind, and placed under guardianship. It appears from the affidavits on file that the juror, prior to his acceptance as such, stated in open court that he had both formed and expressed an opinion, and had served as a juror in the former suit. By allowing him to serve after this disclosure all objections to his competency on this account were waived.

The taxation of the costs of the suit is left very much within the discretion of the trial court (sections 2603, 2604, R. S. 1881), and we see no reason to disturb his ruling, that the party recovering judgment should recover costs.

We find no error in the record for which the judgment should be reversed.

Judgment affirmed.

Filed March 19, 1891.

Goodwine v. Leak et al.

14,861.

GOODWINE v. LEAK ET AL.

DRAINAGE.—*Authority of Drainage Commissioners.—Objections.*—The authority of drainage commissioners to act in the matter of opening a ditch can not be questioned for the first time by a motion for a new trial.

SAME.—New Trial.—It is no ground for granting a new trial to the appellant that other lands than his were not properly assessed.

From the Warren Circuit Court.

J. W. Sutton and W. L. Rabourn, for appellant.

C. V. McAdams, for appellees.

ELLIOTT, J.—The appellant prosecutes this appeal from a decree establishing a public ditch and laying an assessment, for benefits, upon land of which he is the owner.

It appears from the record, in the reports and elsewhere, that the persons who viewed the lands, recommended the opening of the ditch, and fixed the amount of benefits, were drainage commissioners. As such they were recognized by the court, and their authority to act was in no way questioned until the filing of the motion for a new trial, nor was it specifically questioned in the motion; for the only specification in the motion which it is claimed presents any question as to the authority of the commissioners is that which alleges that the finding is not supported by the evidence. It seems quite clear that, even if such a question can be collaterally made, it can not be made for the first time by a motion for a new trial. In order to present such a question in proceedings commenced in a court of general jurisdiction, as was this, the party must opportunely interpose specific objections, obtain a ruling, except to it, and then specify the ruling as a cause for a new trial. We do not mean to be understood as deciding that it is necessary to prove, in the first instance, that the commissioners were regularly appointed as the law directs; on the contrary, we are inclined to believe that where the law authorizes the appointment of officers,

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and they assume to act, the presumption is that they were officers of right, and not usurpers. We are, at all events, quite well satisfied that where they do act under the supervision of a court, and are recognized as rightfully acting by the court, a party who interposes no objection when their reports are presented, nor at any time before the finding, is in no situation to make the objection for the first time by a motion for a new trial.

It is no reason for granting the appellant a new trial that other lands than his were not properly assessed. If his assessment is not erroneous he can not complain.

We can not say that there was any error in assessing benefits against the appellant's land, for there is evidence fully justifying the inference that the assessment was right.

Judgment affirmed.

Filed April 3, 1891.

127 570
129 345
127 570
141 671

No. 14,634.

RAY v. FERRELL ET AL.

MORTGAGE.—Reformation After Foreclosure and Sale.—Where, by mutual mistake of the parties, the description of the mortgaged premises is so defective that no title will pass under a sale, or where, by such mutual mistake, land is described which does not belong to the mortgagor, instead of land which does, there may be a reformation of the mortgage even after sale.

SAME.—Debt Extinguished by Sale of Land under Decree.—In case of such a mutual mistake in the land intended to be mortgaged, yet if land is mortgaged which is owned by the mortgagor, and there is a foreclosure, sale and purchase thereunder by the mortgagee, and the amount of the bid is the amount of the debt due, and the land purchased is worth in value the amount of the bid, the debt is paid, the mortgage extinguished, and there can be no reformation.

JUDGMENT.—Satisfaction by Sale.—A sale of land on execution or order of sale which has not been set aside, is a satisfaction of the judgment to the extent of the net amount realized by the sale.

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TRUST.—*Guardian Purchasing Land with Ward's Money.*—A guardian who purchases and improves a lot or tract of land with his ward's money, taking the title in his own name, creates a resulting or constructive trust in the lot or tract in favor of the ward.

SAME.—While the legal title remains in the guardian, one who, in good faith, buys and acquires a title from him, or takes a mortgage from him on such property, without any notice of the ward's equity, acquires rights therein superior to those of the ward.

From the Vigo Circuit Court.

G. A. Knight and J. A. Pierse, for appellant.

C. F. McNutt and J. G. McNutt, for appellees.

McBRIDE, J.—This was a suit by appellant to foreclose a mortgage on a certain tract of land in Clay county, and on lots numbered 30 and 31 in the town of Cory, in said county, and to reform the mortgage. The reformation of the mortgage sought was with reference to the two town lots, it being averred that when the mortgage was executed the mortgagee owned said lots numbered 30 and 31, which were of the value of \$1,000, and also owned lots numbered 40 and 41 in said town, which were only of the value of \$25 each, and that prior to the making of said mortgage it was agreed and understood by and between the mortgagor and mortgagee that said lots 30 and 31 were to be included in and covered by said mortgage, but that by mutual mistake of both parties lots numbered 40 and 41 were described instead.

Appellees answered, alleging, in substance, that on a certain date appellant brought suit in the Clay Circuit Court against appellees, John R. Ferrell, Oliver James and others, for the foreclosure of the same mortgage sued on and for the collection of the same debt, and also to foreclose a certain other mortgage given on certain other lands in the same county, to secure the same debt, and that such proceedings were afterward had in said cause that appellant recovered a judgment in said court for the sum of \$3,249.48, the amount of the debt secured, and a decree foreclosing both of said mortgages, and an order for the sale of the several tracts of land

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to satisfy the same. That on an order of sale, issued on said decree, the sheriff sold said land, as follows: The land covered by the mortgage not here in suit was sold to one Walter R. Ferrell for \$1,691, and the land included in the mortgage now in suit, including said lots 40 and 41, were sold to and bid in by appellant for \$1,686, said two sums being the full amount and in full satisfaction of said judgment, interest and costs; that said purchasers paid their bids in full, the sheriff executed to them certificates of purchase for the real estate so purchased, which certificates, it is alleged, they still hold; and that said sheriff returned said order of sale satisfied in full. It is further averred that "said judgment, so rendered in said cause, with all said subsequent proceedings had thereunder, is in full force and effect, being unreversed and unappealed from; that the descriptions of said real estate contained in said several mortgages were carried into said judgment, decree, order of sale, the advertisement and sheriff's certificate of purchase; that the said lands and town lots so mortgaged and sold, were, at the time said mortgages were executed, and at the time of said sale, owned in fee simple by the said John R. Ferrell and Oliver James, and were by them inserted in said several mortgages by their true and proper description, and which real estate was at time of sale of the value of four thousand dollars."

The court overruled a demurrer to this answer, and appellants assign the ruling as error.

Appellant's objection to this answer, as stated by counsel in their brief, is that it "contains no denial of the allegations of the complaint as to the mistake or fraud therein set out, of Mr. James, in the making of the two mortgages to appellant of the value of the real estate therein described."

We find no charge of fraud in the complaint, and, indeed, no question of fraud in the case.

The power of courts of equity to reform mortgages and

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other written instruments to make them conform to what the parties to them mutually intended, but through mistake of fact, or fault of the scrivener, failed to express, is frequently invoked and frequently exercised. That a mistake in a mortgage may be corrected and the mortgage reformed and re-foreclosed after foreclosure, and in some cases even after sale, is also settled. *Conyers v. Mericles*, 75 Ind. 443; *Armstrong v. Short*, 95 Ind. 326; *McCasland v. Aetna Life Ins. Co.*, 108 Ind. 130; *Curtis v. Gooding*, 99 Ind. 45; *Jones v. Sweet*, 77 Ind. 187.

These authorities, and many others that might be cited, settle the proposition that when, by reason of the mutual mistake of the parties, the description of the mortgaged premises is so defective that no title would pass under sale, or when, by such mutual mistake, land is described which does not belong to the mortgagor, instead of land which does, there may be a reformation even after sale. In such a case there is no merger of the mortgage, and it certainly can not be said there is any satisfaction of the debt, for the purchaser acquires nothing by the sale. Indeed, the sale is a mere nullity.

In the case at bar, although there was a mistake in the description of the property, yet the property actually described and mortgaged, as well as that intended to be mortgaged, belonged to the mortgagor. By the foreclosure sale the purchaser actually acquired and now has title to the land sold. The answer alleges that its value is several hundred dollars more than the amount of the debt, and that it actually sold for the full amount of the debt, interest and costs, and also shows that the sale has not been vacated. This shows a complete satisfaction of the debt.

A sale of land on execution or order of sale which has not been set aside is a satisfaction of the judgment to the extent of the net amount realized by the sale. 12 Am. & Eng. Encyc. of Law, 159d; *Hood v. Adams*, 124 Mass. 481 (26 Am. Rep. 687); Jones Mortg., section 950, *et seq.*,

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and cases cited; *McCabe v. Goodwin*, 65 Ind. 288; *McIntosh v. Chew*, 1 Blackf. 289.

The mortgage was executed as a mere security for the debt. The debt has been paid. There can be no ground for reforming or reforeclosing the mortgage, as the sole purpose for which it was executed has been accomplished.

The court did not err in overruling the demurrer to this answer.

Howard James, one of the appellees, and who was a defendant below, by his next friend, John McIntosh, filed a cross-complaint against appellant and his co-appellees, alleging, in substance, that he is an infant; that in the year 1872 his co-defendant, Oliver James, was duly appointed his guardian by the Clay Circuit Court, qualified as such, and, with his co-defendant, Thomas Coble, as his surety, executed his bond as such guardian; that his said guardian, having received money belonging to him to the amount of \$1,000, used the same in the purchase of said lots numbered 30 and 31 in said town of Cory, and in the construction of a dwelling-house thereon, said guardian taking the title to said lots in his own name; that he held the title thereto until the 10th day of October, 1879, when he, with his wife and co-defendant, Melissa James, conveyed them to one John McIntosh, upon the agreement that McIntosh should hold the title to the same in trust for this cross-complainant, and for no other purpose, and that said conveyance was made in good faith for said purpose, and before any liens of any character had attached to the same; that afterwards, on the 10th day of March, 1886, said McIntosh conveyed said lots to defendant Thomas Coble, bondsman for said guardian, to be held by said Coble as trustee in trust for cross-complainant, who in good faith, and without notice of any encumbrance or lien on said lots, accepted said trust, and now holds title to said property in trust for cross-complainant; that said guardian, Oliver James, is wholly insolvent, and without property, and that said lots are of the value of \$1,000.

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The prayer of the cross-complainant was that said lots be decreed to be held in trust for him, and that the title be vested in him.

Appellant demurred to the cross-complaint, and his demurrer was overruled. He assigns this ruling as error.

The guardian, having purchased and improved the lots in controversy with his ward's money, and taken the title in his own name, a resulting or constructive trust in the lots was thereby created in favor of the ward. The consideration thus paid drew to it the equitable right of property, and the ward became the true and beneficial owner of the lots. Pomeroy Eq. Jur., sections 981, 1049; Leading Cases in Equity, part 1, p. 335; *Rhodes v. Green*, 36 Ind. 7; *Pugh v. Pugh*, 9 Ind. 132; *Richl v. Evansville Foundry Ass'n*, 104 Ind. 70.

While the legal title remained in the guardian, one who should, in good faith, buy and acquire title from him, or take a mortgage from him on such property, without any notice of the ward's equity, would acquire superior rights therein. The utmost, however, that appellant can claim in the property is an equity. His complaint proceeds on the theory that he has such equity, and that he is entitled to a decree declaring and enforcing it. His equity can be of no higher character than that of the cross-complainant. To the ward's equity has been added the legal title, vested in his trustee for his use. Assuming the equities to be equal the legal title must prevail.

The court did not err in overruling the demurrer to the cross-complaint.

We find no error in the record, and the judgment is affirmed, with costs.

COFFEY, J., took no part in the decision of this cause.

Filed April 3, 1891.

New et al. v. New et al.

No. 14,869.

127 576
138 253
127 576
146 10

NEW ET AL. v. NEW ET AL.

FRAUDULENT CONVEYANCE.—*Plaintiff Himself Having Conveyed Land Sought to be Reached is not Estopped.—Collateral Attack on Decree of Settlement.*—A father bequeathed his real and personal estate to his wife during her life, to be used and enjoyed by her as she might direct. The real estate, however, could not be sold nor disposed of until after her decease, unless it was necessary for her support and maintenance after the personal property had been exhausted. The rents and profits were given to the wife. After the death of his wife, all his real estate, and such of his personal estate as she had not consumed, were given, in equal parts, to his three children, John, George and Mary. His wife qualified as executor, and loaned George, of the assets of the estate, several thousand dollars, taking his notes due to herself personally. After his mother's death John qualified as executor of his father's will and recovered judgment on the notes in favor of his father's estate, and it was a part of the judgment that no execution should issue upon the judgment until the estate was settled. At the final settlement of the estate, this judgment against George was assigned, by decree of the court, to John, and it was decreed that there was due thereon from George to John a specified amount. In an action by John against George to subject the interest in the real estate, which he had inherited from his father, and which it was alleged he had fraudulently conveyed to his wife, and that he was insolvent, to this decree,

Held, that the complaint stated a good cause of action, and that there were not two or more causes of action improperly joined; that John was not estopped from subjecting the real estate that George had fraudulently conveyed to his wife to his claim, by reason of the fact that he, John, had himself conveyed all his interest therein by a warranty deed, he having the right to prosecute the action for the benefit of his grantee and to save himself from liability on his warranty; that the decree in the settlement of the father's estate settled the right of John to recover the balance due on the judgment against George, and that that fact could no longer be controverted.

SAME.—Statute of Limitations.—Practice.—Immaterial Error.—The wife of George plead the six years' statute of limitations.

Held, that the facts alleged in the complaint, which were not controverted and were matters of record introduced in evidence, showed that the cause of action arose within six years previous to the commencement of the action, and that there was no available error in sustaining a demurrer to the answer.

DECEDENTS' ESTATES.—Heir's Share of Proceeds Set Off Against Debt Due

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Estate.—A debt due the estate from a legatee may be retained out of his distributive share of the surplus proceeds of the estate and applied to the payment of a debt due the estate from such heir, although such indebtedness arose after the death of the decedent.

- *ADVANCEMENT.*—*Money Borrowed by an Heir from the Estate.*—Money borrowed from the estate by an heir may be treated as an advancement in an action brought by the heirs for a partition of the decedent's estate after the estate is settled.

From the Marion Circuit Court.

B. F. Davis and W. H. Martz, for appellants.

R. O. Hawkins and H. E. Smith, for appellees.

OLDS, C. J.—The plaintiff John C. New first filed his complaint, on January 21, 1886, against George W. New and Adelia New, his wife, W. Clinton Thompson and Mary C. Thompson, his wife, Casper Carter, Frank New, and Elizabeth New.

The substantial averments of this paragraph are as follows:

That on the 20th day of December, 1877, the defendant George W. New executed to the plaintiff his note for \$1,700.00, due three months after date; that said note, remaining unpaid on the 28th day of December, 1882, the plaintiff sued thereon in this court, and in said action recovered a judgment, on the 20th day of December, 1877, for \$2,200.00, which remains unpaid, and on which judgment execution has been returned *nulla bona*; that on the — day of January, 1872, John B. New died testate, at said county, the owner in fee simple of the south half of lot two (2), in block forty-seven (47), in the city of Indianapolis, Indiana, and of a large amount of personal property, and that on the — day of January, 1872, said will was duly admitted to probate in said county; that by the terms of said will he bequeathed "the whole of his estate to Maria New, his wife, to have, hold, and use the same during her natural life, and at her death said will provided that whatever remained should be

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equally divided between his three children, the defendants Mary C. Thompson, George W. New, and the plaintiff John C. New; that while said estate was in the hands of, and under the control and management of said Maria New, she loaned to the defendant George W. New, of the funds of said estate, on the 1st day of May, 1872, five thousand dollars, for which she took his note, due ten months after date, and on the 19th day of July, 1872, she loaned said George W. New, of the funds of said estate, seven hundred dollars, for which he executed and delivered his note to said Maria New; that Maria New died in 1880, and at that time no part of either of said notes had been paid; that the plaintiff was appointed executor of said will, and on the 20th day of November, 1880, he qualified as such, and as such executor of the will of John B. New, deceased, he recovered judgment against the defendant George W. New, upon said notes given to the said Maria New in this court on the 1st day of July, 1884, for eleven thousand six hundred and twenty-four dollars and six cents; that it was provided in said judgment that no execution should issue on the same until after the final settlement of the estate of said John B. New, deceased, should be made; that in 1885 the plaintiff, as such executor, made final settlement of said estate, in which it was adjudged that of said judgment in his favor, as such executor against George W. New, there was due to the plaintiff the sum of \$4,813.68, by reason of the fact that he was then the owner of Mrs. Thompson's interest in said estate, and to equalize him under the provisions of said will; that on the 3d day of February, 1880, defendant George W. New conveyed without consideration his undivided one-third of said real estate to the defendant Mary Thompson, by quitclaim deed, for the purpose of defrauding his creditors; that the defendant George W. New has occupied a portion of a building erected upon said south half of lot two (2), in block forty-seven (47), by the plaintiff, at his sole expense, and which portion is of the rental value of \$20 per

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month, and has never paid any rent; that Mrs. Thompson never exercised any control over the premises; that on the 3d day of February, 1880, the defendant George W. New was the owner of certain other real estate described, the title to which by the judgment was quieted in the defendants Adelia New and Frank New, which he conveyed without consideration to the defendant, Caspar Carter, for the purpose of defrauding his creditors (but these pieces of real estate are no longer in issue and will not be further noticed). Prayer, that said several conveyances be set aside and said several parcels of real estate be sold to pay plaintiff's judgment.

On the 7th day of June, 1886, the plaintiff filed two additional paragraphs of complaint, the second paragraph averring the same facts regarding the will and estate of John B. New and the conveyances of George W. New to defendant Mary Thompson of his one-third part of the real estate of which John B. New died seized, averred the settlement of the estate of John B. New, and the judgment of \$4,813.08, and adds the additional averment that after such conveyance to her the said defendants Mary Thompson, and W. Clinton Thompson, her husband, conveyed the same to the defendant, Adelia New, without consideration.

The third paragraph avers the recovery of the judgment on the note mentioned in the first paragraph of the complaint executed by George W. New to the plaintiff, that it is unpaid, the conveyance of certain other property to the defendant Caspar Carter, by defendant George W. New, without consideration, and to defraud his creditors, and that all the defendants claim some interest in the said real estate so conveyed.

Each paragraph charged the insolvency of defendant George W. New, and prays for setting aside the deeds of conveyance named therein, and asks that the real estate be sold to pay plaintiff's debts, etc.

The defendants Adelia New and Frank New each filed

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their separate demurrer to each paragraph of the complaint, stating as causes for demurrer that neither paragraph of complaint stated facts sufficient to constitute a good cause of action, and that "there are two or more causes of action improperly united" in the complaint. Which demurrer was overruled and exceptions reserved. The defendants, Adelia and Frank New, filed a joint answer in two paragraphs. The first a general denial, and the second pleaded the six years' statute of limitation to the second and third paragraphs of the complaint.

The plaintiff demurred to the second paragraph of answer for want of facts, which was sustained and exceptions to the ruling noted.

Adelia New filed a separate answer, setting forth that, as to said real estate of which John B. New died seized, the plaintiff was estopped to prosecute this suit for the reason that before the bringing of the suit the plaintiff had conveyed the same by warranty deed, for a valuable consideration, to one Harry S. New, who, before the commencement of this suit, conveyed the same for value by warranty deed to Elizabeth New, who claims title to the same by virtue of said several conveyances, and that by reason thereof the plaintiff is estopped from subjecting said real estate to the payment of said judgment of the plaintiff against the said defendant, George W. New. To this paragraph of answer plaintiff replied in denial.

The defendant Adelia New filed a cross-complaint against the plaintiff, in which she averred that on the 28th day of February, 1880, she became the owner, by purchase, for a valuable consideration, from the defendant George W. New, of his undivided one-third interest in the south half of lot two (2), in block forty-seven (47), in the city of Indianapolis, and is still the absolute owner in fee thereof; that on the 15th day of April, 1876, the First National Bank of Indianapolis, Indiana, recovered judgment against the defendant George W. New, and others, in this court, for \$2,148 and

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costs, taxed at \$34.86, and that afterwards, on the 9th day of April, 1881, sold on execution the real estate on Washington street, described in the complaint as the property of the defendant George W. New, to satisfy said judgment; that the plaintiff purchased the same at said sheriff's sale for \$2,000, and received his certificate of purchase therefor, and which certificate he assigned to the said Adelia New on the 8th day of September, 1881, and upon which certificate she obtained the deed from said sheriff, for said real estate, on the 4th day of December, 1882, since which time she has been the absolute owner of said real estate; that on the 14th day of April, 1876, the First National Bank recovered judgment in this court against the defendant George W. New, and others, in the sum of \$2,148; that on the 3d day of July, 1878, the bank assigned the judgment to this plaintiff, and on the 9th day of April, 1881, defendant George W. New, and others, in the sum of \$2,148; that on the 3d day of July, 1878, the bank assigned the judgment to this plaintiff, and on the 9th day of April, 1881, defendant George W. New paid on said judgment \$2,000, and on the 7th day of September, 1881, the plaintiff being the owner thereof by assignment, assigned said judgment to cross-complainant Adelia New, and that she on the 6th day of April, 1886, had said judgment revived, and the lien thereof continued, and that there is due and unpaid thereon the sum of \$1,032; that on the 3d day of October, 1879, in the circuit court of Hendricks county, Indiana, the plaintiff recovered judgment against the defendant George W. New, in the sum of \$1,231.71; that on the 30th day of January, 1881, the plaintiff filed in the office of the clerk of the Circuit Court of Marion county a certified copy of said judgment, and on the 7th day of September, 1881, the plaintiff assigned said judgment to her, and that in said circuit court, on the 6th day of March, 1886, said judgment was revived against the defendant George W. New; that the same remains due and unpaid, in the sum of \$1,705.92. Prayer that her title be quieted to the said

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real estate described in her cross-complaint, and that her said judgments be decreed superior liens to the judgment of the plaintiff.

The plaintiff demurred to the cross-complaint, which was overruled, and plaintiff answered in two paragraphs. The first a general denial. The second paragraph averred, so far as relates to the south half of lot two (2), in block forty-seven (47), in the city of Indianapolis, that the same was the property of the estate of John B. New, and that the conveyance to the plaintiff was without consideration, and for the purpose of defrauding creditors of George W. New, and that cross-complainant had full knowledge that her husband, George W. New, had received a large amount of said estate in excess of his share. That cross-complainant demurred to the second paragraph of answer to her cross-complaint which was overruled, and she replied thereto in denial.

The defendant Frank New filed a cross-complaint, in which he claimed to be the owner in fee for value, and in good faith, of a part of the real estate described in the plaintiff's complaint, and asked that his title be quieted.

The defendant, Elizabeth New, filed an answer in which she avers that the plaintiff conveyed the south half of lot 2, in block 47, in the city of Indianapolis, to Harry S. New, who conveyed the same to her and that she is the owner thereof.

Upon the issues joined the cause was tried by the court, resulting in a finding against the defendants George W. New and Adelia New, and the separate motion of each for a new trial was overruled, and exceptions taken and judgment rendered. Appeal was taken to the general term of the superior court and the judgment of the special term affirmed.

The first question discussed by counsel is an alleged error of the court in overruling a motion to strike out parts of the complaint. We are not referred to any part of the record presenting any question as to the overruling of a motion to strike out any part of the complaint, and from an

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examination of the record we have not been able to find any record of such a motion having been filed or ruled upon, hence we do not consider the question. The next question presented is the ruling on the demurrer to the complaint. We do not think there was any error in this ruling. The paragraphs of the complaint were sufficient to withstand a demurrer.

It seems that the widow of John B. New loaned the money to George W. New, and after her death the appellee, John C. New, was qualified as the executor of the last will of said John B. New, and as such executor obtained judgment against said George W. New on said notes for nearly \$12,000, and afterwards, on final settlement, the balance due on the judgment was transferred and decreed to be due the appellee, John C. New, as a part of his distributive share in said estate. The former adjudications settled the right of the said appellee to recover the balance due upon the judgment. The complaint further alleges a fraudulent transfer by George W. New of the real estate for the purpose of defrauding his creditors, and it further shows that the said Adelia New is the wife of the said George W. New.

It is further contended that the court erred in sustaining the demurrer to the second paragraph of the answer of Adelia and Frank New pleading the six years' statute of limitation. The facts stated and alleged in the complaint, which are not controverted, and are matters of record introduced in evidence, show that the cause of action did arise within six years previous to the commencement of the action, and there is no available error in sustaining the demurrer to this paragraph of answer.

It is next claimed that the court erred in overruling the demurrer to the reply of appellee, John C. New, to the separate answer of Adelia New, which answer alleged that as to said real estate of which John B. New died seized, plaintiff was estopped from subjecting said real estate to sale for the payment of his judgment, for the reason that he had con-

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veyed said real estate by warranty deed to Harry S. New, who, before the commencement of this suit, had conveyed the same to Elizabeth New who claims title to the same. A bad reply is good to a bad answer. Possibly, as against Harry S. or Elizabeth New, the plaintiff would have been estopped from subjecting the real estate, which he had conveyed by warranty deed, to sale for the payment of his judgment, but this defence was not available to the appellant, Adelia New. It may have been the purpose of the grantor in subjecting it to sale to perfect his title for the benefit of his grantees.

The next question presented arises upon the overruling of the motion for a new trial, as to the sufficiency of the evidence to support the finding and judgment.

Items one and two of the will of John B. New are as follows:

“Item first. I will and bequeath to my wife, Maria New, all of my estate, real and personal, during her natural life, to be by her used and enjoyed as she may direct: *Provided*, however, that it is my will that the real estate of which I may be seized shall not be sold or in any way disposed of until after her decease, unless the same may be necessary for her support and maintenance after my personal property has been exhausted; and further direct that the rents and profits of my real estate, after payment for necessary repairs, shall be by my wife used as she may direct.

“Item second. After the death of my said wife, it is my will and desire that all of my real estate of which I may die seized, as well as all the personal property which shall not have been used by my said wife, shall be equally divided between my children, George W. New, Mary C. Thompson and John C. New, or their heirs respectively, share and share alike.”

After the death of John B. New, George W. New borrowed of the widow about \$8,000 in money, and executed his notes to her for the same. After the death of the widow

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the appellee John C. New was appointed executor of the last will of his father, John B. New, and as such executor brought suit against George W. New on the notes given to his mother, the widow, and recovered judgment upon the notes, and it was ordered that execution should not issue thereon until after the settlement of said estate. Upon the final settlement of the estate, it was found that there was due the estate on said judgment \$4,813.68 from George W. New over and above the amount of his share of the personal property, and for the purpose of settling said estate the judgment in favor of the estate against George W. New was, by order of the court, transferred to John C. New as a part of his portion of the estate. It is contended, on the part of the appellants, that the money borrowed by George W. New of his mother was her individual money, and not the money of the estate. This can not be maintained in this case, for the reason that it is settled against the said George W. New, in the former adjudications between him and the estate in the suit wherein the judgment was rendered; again on the settlement of the estate, when by order of the court the judgment was transferred to John C. New as a part of his share of the estate, and by reason of which transfer the said George W. New received a larger portion of the other property of the estate; for by treating the judgment as a part of the assets of the estate of John B. New, the amount due to each legatee would be proportionately greater, and George W. New received his share out of the other property of the estate, and he is precluded from again litigating this question. These former adjudications set at rest the question as to whom the money loaned belonged; and, in this case, it must be treated as a part of the estate of John B. New which passed to the legatees by the terms of the will, the same as if it was a part of the personal estate of which the testator died the owner, and which had not been consumed, or used by the widow in her lifetime.

There yet remains the further question as to whether or

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not John C. New had the right in equity to have the portion of the real estate which George W. New took by the will applied to the payment of the judgment. By the terms of the will the three children took the estate, real and personal, of the father, in equal parts, subject to the right of the widow to use and control the same during her life. During the life of the widow she advanced, in the shape of a loan, to George W. New, some \$8,000. In equity, when she died the estate ought to be so adjusted and distributed as that each of the other children would receive an equal amount with George W. The fact that he procured a portion of the money in the custody of the mother to which the other two were entitled, even by giving a note for its repayment, ought not to give him any advantage in the distribution of the estate, and, in equity, we think it should be treated as an advancement to him. If an advancement, then in a partition of the real estate between the heirs he would only have such interest in the real estate as would be due him after adjusting the advancement. But the parties have sought another way of adjusting and equalizing the estate between the legatees. The executor brings suit, and recovers judgment against the legatee, George W., who borrowed a part of the funds of the estate.

In the case of *Fiscus v. Moore*, 121 Ind. 547, it was held by a majority of this court, and is now the settled law of the State, that a debt due an estate of an intestate from an heir may be retained out of his distributive share of the surplus proceeds of real estate which has been regularly sold in order to make assets to pay debts, as against one who took a mortgage pending the settlement of the estate, with knowledge of the indebtedness. If an administrator has the right to apply money due the heir for his share of real estate, which accidentally comes into his hands by reason of the non-divisibility of real estate, so that only a sufficient amount can be sold to pay the debts of the estate, by reason of which indivisibility the administrator is compelled to sell all the

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land, thereby reserving a surplus from the sale of the real estate to the payment of a debt due the estate, then the administrator certainly has the right, in equity, in case no sale is made of the real estate by which a surplus comes into his hands, to have the interest of the heir applied to the payment of the debt due the estate. In that case it is said: "The right of heirs to participate equally in the estate of their ancestor is superior to that of a lien-holder with notice."

This recognizes the doctrine that there exists a right to have an equal distribution of the estate between heirs devisees, and legatees, and for that purpose there exist, in equity, a lien and right to have such a portion of an estate, whether real or personal, as goes to the heirs, applied to the payment of a debt due from the heir to the estate. In the case at bar, and in like cases, the estate vested, subject to the rights of the widow, and the testator contemplated an equal distribution of such portion of his estate as remained at the death of the widow between the legatees, share and share alike.

In this case the widow had full power to use such portion of the estate as necessary to supply her wants during her life, and at her death provision was made for an equal distribution of the estate remaining between the three children; before her death one obtains possession of a portion of the funds constituting a part of the estate, and executes his note for the same, which becomes a part of the assets of the estate. The portion of the real estate which George W. took by the will was subject to the payment of the judgment taken for the portion of the personal estate which he had obtained, and the executor had the right to have it subjected to sale to pay the debt, or in a partition of the real estate the other devisees had the right to have it treated as an advancement, so that the debtor had no interest in the real estate except the amount remaining in excess of the amount of the judgment. The executor having the right, to subject the land to the payment of the judgment, the

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assignee also had the same rights. See, also, *Foltz v. Wert*, 103 Ind. 404; *Peek v. Williams*, 113 Ind. 256; *Alleman v. Hawley*, 117 Ind. 532; *Carver v. Fennimore*, 116 Ind. 236; *Koons v. Mellett*, 121 Ind. 585.

It is contended that George W. had conveyed the real estate to his wife, Adelia, for a valuable consideration, before the commencement of this suit, and as against her the land can not be subjected to the payment of the judgment. The question of consideration for the deed to her is disputed, and there is evidence tending to prove that there was no valid consideration for such conveyance. This court must treat it as a voluntary conveyance, without any consideration; and she took only such interest in the land as her husband, in fact, had, subject to the equities of the co-tenants. We do not deem it necessary to further discuss the evidence in the case, or the form of the judgment.

There is no error in the record for which the judgment should be reversed, all of the appellants having filed disclaimers except Adelia New.

Judgment is affirmed, at costs of Adelia New.

ELLIOTT, J., took no part in the decision of this case.

Filed April 1, 1891.

127	588
130	442
127	588
131	479
128	188
127	588
135	536
136	588
127	588
145	89

No. 16,006.

HOVEY, GOVERNOR, v. THE STATE, EX REL. SCHUCK.

MANDAMUS.—*Governor Can Not be Mandated.*—The courts can not, by *mandamus*, compel the Governor of this State to act in matters affecting his gubernatorial duties. *Mandamus* does not lie to compel him to issue a commission to a person claiming to be elected to an office. *Gray v. State*, *ex rel.*, 72 Ind. 567, distinguished.

CONSTITUTION.—*Three Departments Distinct.*—One department of the government can not invade the province of either of the other two.

From the Marion Circuit Court.

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A. C. Harris, for appellant.
J. D. New, W. New, J. E. McDonald, J. M. Butler and
A. H. Snow, for appellee.

COFFEY, J.—This was a suit instituted by the appellee, in the Marion Circuit Court, against the appellant, as the Governor of the State, to compel the latter, by *mandamus*, to issue to the relator, William A. Schuck, a commission as the duly elected auditor of Jennings county. The complaint alleges, among other things, that the relator was duly elected to the office of auditor of Jennings county, at the regular election held in the month of November, 1890; that the votes were duly canvassed, and the proper returns made out and filed in the office of the secretary of state, within ten days after the date of said election, by which it appears that the relator was duly elected auditor of said county by a majority of thirty-nine votes; that on the 24th day of November, 1890, the relator demanded of the appellant, at the office of the Governor, in the city of Indianapolis, his commission as such auditor, but the appellant refused, and still refuses, to issue and deliver to him said commission.

To the alternative writ of mandate the Governor filed a return, consisting of two paragraphs. In the first paragraph it is averred, among other things, that on the 10th day of August, 1885, the relator herein was appointed treasurer of Jennings county, and held that office until the 18th day of November, 1886; that on the 8th day of November, 1890, the treasurer of Jennings county filed with the appellant, as the Governor of the State, an official affidavit, stating that the relator had failed to account for and pay over public moneys received by him as such treasurer, in the sum of \$1,884.06; that the auditor's term in said county began on the 13th day of November, 1890; that the matter of said defalcation was known to the voters throughout said county on the day of election; and that on the 17th day of November, 1890, one Cope, who was an opposing candidate for said

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office, and who received the next highest number of votes to the relator, filed with the appellant, as such Governor, a demand, stating that the relator, by reason of said facts, was ineligible to said office, and that he, the said Cope, was elected and entitled to the commission; that on the 20th day of November, 1890, the relator paid to the treasurer of Jennings county the sum of \$2,357.66 on said defalcation, but neglected to pay the interest and penalty thereon.

The Governor asked that Cope be made a party with liberty to interplead with the relator and try the question as to which, if either, was entitled to the commission and to have the office.

The court struck out that portion of the return which sought to make Cope a party, and the appellant excepted.

The appellee then replied to the return, among other things, that when he retired from the office of treasurer of Jennings county, on the 18th day of November, 1886, he made settlement with the board of commissioners of said county and paid over to his successor in office all moneys found to be due from him as the treasurer of said county, and took a receipt therefor; that he believed said settlement was correct; that if a mutual mistake did occur in said settlement the amount paid by him on the 20th day of November, 1890, was more than sufficient, as he believed, to cover all amounts found due upon a judicial investigation.

After this reply was filed the appellant added a third paragraph to his return which, in addition to the averments above set out, averred, also, that the commissioners of said county had appointed Daniel Bacon and Frank F. Frecking, two competent men, to examine the books and papers in the treasurer's office during the time the relator was treasurer of said county; that on December 16th, 1890, they reported that after a careful examination of the books, papers and accounts, they found that at the expiration of his term of office there was a balance due from the relator to said county of \$4,854.84.

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To this answer the appellee replied substantially as in the reply above referred to, adding that the relator did not believe there was any shortage; that if there was he was ready to pay the same; that no other sum had ever been demanded of him than \$2,357.66 until the 22d day of December, 1890, when a further claim was made for \$2,497.18; that the sum he had paid in would, upon investigation, be found to exceed any shortage against him.

The appellant filed a demurrer to each paragraph of the reply. The court overruled the demurrer to the replies and carried it back and sustained it to the answer. The appellant declining to amend the appellee had judgment as prayed, from which this appeal is prosecuted.

The case has been ably presented, both by oral argument and by the briefs filed in the cause; and we are urged to decide: *First.* As to whether the case is one in which *mandamus* may be maintained; and, *Second.* As to what is the proper construction of article 2, section 10, of our State Constitution.

The first question presented is, in our opinion, the controlling question in the case, for if the Governor can not be mandated in the matter involved in this suit, then the second question does not arise, and anything we might decide in relation to it would be without binding force.

As the writ of *mandamus* will not issue to compel the doing of a thing which is discretionary, it follows also that if the case before us is one where the Governor may be compelled to act he has no discretion to be exercised, and the writ should issue without regard to the construction to be placed upon the constitutional provision above referred to.

It is plain, therefore, that the second question suggested is of but little if any importance in the controversy now before us. We proceed, therefore, to an examination of the question as to whether the case is one in which the Governor of the State may be compelled by *mandamus* to act.

The question as to whether the chief executive of a State

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is subject to the control of the courts by means of the writ of *mandamus*, is not new, nor is it without numerous authorities.

Some conflict is found to exist in the adjudicated cases, but it is believed that such conflict arises more from the different provisions of State Constitutions and the particular facts in each case than from a difference of opinion, as the general rules by which such cases are governed. Not only is there some apparent conflict in the cases, but the text-writers do not entirely agree upon the question as to whether the courts possess the power to control the acts of the Governor in any particular case.

Mr. Moses, in his work on *mandamus*, after a somewhat elaborate discussion of the question, and an admission that the courts have no power to control the action of the chief executive of a State in the discharge of his ordinary official duties, nor to compel him to perform any act over which he has the right to exercise his judgment or discretion, reaches the conclusion that the better doctrine is that he may be compelled, by *mandamus*, to perform a duty clearly defined and enjoined by law, and which is merely ministerial in its nature, and neither involves any discretion, nor leaves any alternative. *Moses Mandamus*, pp. 80, 82.

Mr. Wood, in his valuable work on *Mandamus, etc.*, reaches directly the opposite conclusion, and maintains that an attempt on the part of the courts to interfere with the discharge of executive duties is not only in opposition to our theory of government, and in excess of their power, but is, also, attended with great danger. In discussing the question he says: "If the courts may interfere with the discharge of *any* ministerial duties of the executive department of the government, they may interfere with all, and we should have, the singular spectacle of a government run by the courts instead of the officers provided by the Constitution. Each department of the government is essentially and necessarily distinct from the others, and neither can lawfully trench upon

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or interfere with the powers of the other ; and our safety, both as to national and State governments, is largely dependent upon the preservation of the distribution of power and authority made by the Constitution, and the laws made in pursuance thereof." Wood *Mandamus* (2d ed.), p. 88.

Of the adjudicated cases upon the subject now under discussion the case of *People, ex rel.*, v. *Governor*, 29 Mich. 320, is, perhaps, one of the leading cases. In that case it was urged that the act which appellant sought by *mandamus* to compel the Governor to perform was not to be done in the performance of an executive duty imposed by the Constitution, but was an act in its nature a ministerial act, provided for by statute, and which might, with equal propriety, have been required of an inferior officer, who, beyond question, could have been compelled by *mandamus* to take the necessary and proper action in the premises, and it was argued, for that reason, that the courts possessed the power to control the Governor's action by a writ of *mandamus*.

In answer to this argument Judge COOLEY, who delivered the opinion of the court, said : " But when duties are imposed upon the Governor, whatever be their grade, importance or nature, we doubt the right of the courts to say that this or that duty might properly have been imposed upon a secretary of state, or a sheriff of a county or other inferior officer, and that inasmuch as in case it had been so imposed, there would have been a judicial remedy for neglect to perform it, therefore there must be the like remedy when the Governor himself is guilty of a similar neglect. The apportionment of power, authority and duty to the Governor, is either made by the people in the Constitution, or by the Legislature in making laws under it ; and the courts, when the apportionment has been made, would be presumptuous if they should assume to declare that a particular duty assigned to the Governor is not essentially executive, but is of such inferior grade and importance as properly to pertain to

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some inferior office, and consequently, for the purposes of their jurisdiction, the courts may treat it precisely as if an inferior officer had been required to perform it. To do this would be not only to question the wisdom of the Constitution or law, but also to assert a right to make the Governor the passive instrument of the judiciary in executing its mandates within the sphere of his own duties. Were the courts to go so far, they would break away from those checks and balances of government which were meant to be checks of co-operation, and not of antagonism or mastery, and would concentrate in their own hands something at least of the power which the people, either directly or by the action of their representatives, decided to intrust to the other departments of the government."

The case of *Bates v. Taylor*, 87 Tenn. 319, reported in 28 Am. Law Reg. 341, is in point here.

In that case Bates sought to enjoin the Governor from issuing a certificate of election to H. Clay Evans, and to compel him, by *mandamus*, to deliver a certificate of election which had been made out and signed by the Governor, and attested by the secretary of state as evidence of the fact that Bates had been elected.

In that case the court, by Caldwell, J., said: "The issuance of such commission or certificate, whether called a ministerial or an executive duty, is an official action, whose performance can be neither coerced nor restrained by the courts. An attempt on the part of the courts to control his [the Governor's] action under this statute would be an invasion by one department of the government of the rights of another department, and, for that reason, a violation of sections 1 and 2 of Article 11 of the Constitution, which are in the following language:

"Section 1. The power of the government shall be divided into three distinct departments—the legislative, executive, and judicial.

"Sec. 2. No person or persons belonging to one of these

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departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directly permitted."

Many cases are to be found in which it is held that the Governor of a State can not be compelled by *mandamus* to perform a ministerial duty, among which are *Hawkins v. Governor*, 1 Ark. 570; *State v. Governor*, 25 N. J. 331; *People, ex rel., v. Bissell*, 19 Ill. 229; *Dennett, Petitioner*, 32 Me. 508; *Mauran v. Smith*, 8 R. I. 192; *Jonesboro, etc., T. P. Co. v. Brown*, 8 Baxt. (Tenn.) 490; *State v. Towns*, 8 Ga. 360; *People, ex rel., v. Yates*, 40 Ill. 126; *Pacific Railroad v. Governor*, 23 Mo. 353; *State, ex rel., v. Warmoth*, 22 La. Ann. 1; *Rice v. Austin*, 19 Minn. 103; *Appeal of Hartranft*, 85 Pa. St. 433; *State, ex rel., v. Drew*, 17 Fla. 67; *People, ex rel., v. Cullom*, 100 Ill. 472.

On the other hand, many cases are to be found in which it is held that the courts possess jurisdiction to compel the chief executive of a State to perform an act which is purely ministerial in its nature, among which are *State v. Governor*, 5 Ohio St. 523; *Bonner v. State, ex rel.*, 7 Ga. 473; *Cotten v. Ellis*, 7 Jones (N. C.), 545; *Chamberlain v. Sibley, ex rel.*, 4 Minn. 309; *Magruder v. Swann*, 25 Md. 173. The case of *Chamberlain v. Sibley, ex rel., supra*, was overruled, however, by the latter case of *Rice v. Austin, supra*.

The cases above cited, as well as all others of the same import, seem to rest chiefly upon the *dictum* of Chief Justice MARSHALL, in the case of *Marbury v. Madison*, 1 Cranch, 137. The case of *Marbury v. Madison, supra*, was an action brought by Marbury and others to compel President Jefferson's secretary of state, Mr. Madison, to deliver to the plaintiffs their commissions as justices of the peace in the District of Columbia. They had been appointed and confirmed during the administration of President Adams, and their commissions had been signed and sealed. The action was brought in the Supreme Court of the United States, and it was held that the court did not have original jurisdiction

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in the cause. This being true, of course, all that is said in the case upon any subject other than that bearing upon the question of jurisdiction is mere *dictum*, but what is said in the opinion upon other subjects, coming as it does from such an eminent source, is entitled to great weight, though not having the force of an adjudication. Assuming that all said in the case is a correct exposition of the law upon the subject of *mandamus*, we must keep in mind the fact that it was not a suit against the President of the United States, but a suit against the secretary of state, and the language used must be construed with reference to the case then before the court.

We are not justified in assuming that Chief Justice MARSHALL would have used the same, or similar, language, had the action been brought against the President of the United States; nor do we think the case is in point in an action against the chief executive of a State. It does apply, however, in an action against the secretary, auditor, or treasurer of a State, or other administrative officer. The cases, therefore, above cited, resting upon the case of *Marbury v. Madison*, in which it is held that the chief executive of a State may be compelled, by *mandamus*, to perform ministerial duties, rest upon authority which does not sustain the conclusion reached, and should not be followed.

It is claimed by the appellee that the question of the power of the courts in this State to compel the Governor, by *mandamus*, to perform merely ministerial duties is settled, and the cases of *Governor v. Nelson*, 6 Ind. 496; *Biddle v. Willard*, 10 Ind. 62; *Baker v. Kirk*, 33 Ind. 517, and *Gray v. State, ex rel.*, 72 Ind. 567, are relied on to sustain this contention.

In the case of *Governor v. Nelson, supra*, the parties sought to obtain a construction of certain constitutional and statutory provisions, and no question relating to the power of the courts to compel the Governor to act was presented to the court or decided.

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In the case of *Biddle v. Willard*, *supra*, the writ was denied, and the question of jurisdiction was not raised or decided by the court.

The case of *Baker v. Kirk*, *supra*, was submitted to the court upon an agreed statement of facts, and sought to obtain a construction of certain statutory provisions relating to the election of directors of the State Prison South, and no question was made, or decided, as to the power of the court over the acts of Governor Baker.

The case of *Gray v. State*, *ex rel.*, *supra*, was brought against the Governor, the attorney general, the secretary of state and the treasurer of state, to compel them to redeem a certain bond, under the provisions of an act approved December 12th, 1872. In that case the point was made that the Governor could not be compelled by *mandamus* to act, but this court said: "The Governor and the other officers named in the act may well be regarded as constituting a board, organized by the Legislature for the performance of certain duties; and a mandate will lie against them to enforce the performance of the duties prescribed." This branch of the case proceeds upon the theory that executive duties can be performed by the Governor alone, and that as the act constitutes him a member of a board where he is required to act with others, his duties can not be said to pertain to the executive department of the State.

It is unnecessary that we should express our approval or disapproval of this case, as it must be apparent to every one, upon a moment's reflection, that the case before us is distinguished from this case and rests upon entirely different principles.

We do not think the cases cited settle the question in this State that the courts have the power to compel the Governor by writ of *mandamus* to perform any act enjoined upon him, either by the Constitution or laws of the State, where such act pertains to a duty to be performed by him as the Governor of the State. If such power exists we must look else-

Hovey, Governor, v. The State, *ex rel.* Schuck.

where than to the decisions of this court to find it. It can not exist unless it is conferred by the Constitution of the State, or unless it is one of the inherent powers of the courts.

Our State Constitution, article 3, section 1, is as follows: "The powers of the government are divided into three separate departments; the legislative, the executive, including the administrative, and the judicial; and no person charged with official duties under one of these departments shall exercise any of the functions of another, except as in this Constitution expressly provided."

This provision does not differ materially, in legal effect, from the provision above copied from the Constitution of the State of Tennessee. Under this provision of our Constitution, above quoted, it has been said by this court that the powers of the three departments of State are not merely equal, they are exclusive in respect to the duties assigned to each. They are absolutely independent of each other. They are equal, co-ordinate, and independent. This division of power prevents the concentration of power in the hands of one person, or class of persons. *Wright v. Defrees*, 8 Ind. 298; *Lafayette, etc., R. R. Co. v. Geiger*, 34 Ind. 185; *State, ex rel., v. Denny*, 118 Ind. 382; *City of Evansville v. State, ex rel.*, 118 Ind. 426; *State, ex rel., v. Denny*, 118 Ind. 449; *State, ex rel., v. Noble*, 118 Ind. 350.

In the last case cited it was held that neither the legislative nor the executive departments of the State could interfere with the duties, or functions, of this court.

It is true that the legislative department may increase, or diminish, the jurisdiction of the court, and may, within the terms of the Constitution, prescribe rules of practice. It is within the province of the courts to expound and enforce such laws as the legislative department may enact within the constitutional limit, and to decline to enforce such as are in conflict with the Constitution. It is within the province of the executive department of the state to discharge such duties as are imposed upon it by the Constitution of the State,

Hovey, Governor, *v.* The State, *ex rel.* Schuck.

and such as may be imposed by valid enactments of the legislative department. In each of these cases the department acting, or declining to act, is within its legitimate sphere; and if either department fails to perform its duty the remedy is not to be found in the attempt of some other department to perform such duties.

Such attempt would be usurpation, more dangerous to free government than the evil sought to be corrected. Should we attempt to control the Governor in the matter of the discharge of any of the duties pertaining to his office as Governor, we would be taking one step in the direction of absorbing the functions of the executive department of the State. This we should not do, unless the case before us is such that we are driven to such course by an unbroken chain of precedents, in like cases, from which there is no escape.

The case before us, as we understand the pleadings, is this: At the November election, in 1890, the relator received the highest number of votes for the office of auditor of Jennings county, which fact was duly certified to the secretary of state. Prior to the time the relator called for his commission the treasurer of Jennings county filed with the Governor an affidavit to the effect that the relator, prior to his election, had been the treasurer of said county, and had failed to account for a large amount of the funds which had come into his hands as such treasurer. Subsequently Mr. Cope appeared and claimed that he was elected to the office for which the relator demands a commission upon the ground that the relator was ineligible to the office, which fact was known to the electors of Jennings county at the time of the election, and that he, Cope, received the next highest number of votes for the office. Under these facts the Governor decided not to issue any commission.

We think the Governor's decision in this matter must be taken as final. The case is not one where the Governor is acting as the member of a board created by legislative enact-

Jerauld et al. v. Dodge et al.

ment, in a matter wholly disconnected with his functions as Governor of the State ; but it is a case where he is required to act as Governor. It is his office, as chief executive of the State, that gives force and vitality to the commission. He executes it as the Governor of the State of Indiana ; and whether he derives his power to do so from the Constitution of the State, or by legislative enactment, without the office of chief executive behind it, it is of no validity.

Having reached the conclusion that the courts of this State have no power to control the Governor in matters of the kind before us, and that the conclusion of the Governor in the particular here involved is final, it follows that the Circuit Court erred in overruling the demurrer of the appellant to the replies, and in sustaining it to the answers.

Judgment reversed, with directions for further proceedings not inconsistent with this opinion.

Filed April 4, 1891.

No. 14,385.

JERAULD ET AL. v. DODGE ET AL.

127 600
140 177

From the Gibson Circuit Court.

T. R. Paxton, C. A. Buskirk and J. W. Brady, for appellants.

R. D. Richardson, J. T. Walker, L. C. Embree, J. H. Miller, J. E. McCullough, A. P. Twineham and G. Palmer, for appellees.

MITCHELL, J.—The questions involved in this appeal are the same as were determined in *Habig v. Dodge*, *ante*, p. 31. The judgment of the court below is affirmed, with costs, for the reasons given in the opinion filed in that case.

Filed Sept. 20, 1890; petition for a rehearing overruled Jan. 28, 1891.

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Held, that the presumption was that the board of commissioners met with the board of equalization upon the day it was required to convene, and made a record of such meeting; that the board of commissioners organized as a board of commissioners on that day (for the law required them to act as a board of commissioners when sitting with the board of equalization, and not as individuals), and that having so organized as such a board on the first day of the term, they were lawfully in session as a board of county commissioners upon the second day of their term. *Ib.*

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Held, that it was competent for the State to prove when the wife made known her husband's complicity in the crime. *Ib.*

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13. *Robbery.—Indictment.—Evidence.*—Under an indictment charging the taking of ten dollars in money it is not necessary to prove its value, as money is the measure of values. *McCarty v. State, 223*

14. *Embezzlement by Guardian.—Affidavit and Information.—Sufficiency of.—Statute of Limitations.*—An affidavit and information against a guardian for the embezzlement of the funds of his ward charged that the defendant on the day of his appointment as guardian, October 10th, 1879, collected money and other personalty belonging to the ward; that the ward became of age March 5th, 1889, and that on November 28th, 1890, a demand for settlement was made, which the defendant refused to comply with, and converted the money to his own use.

Held, that as the date of the demand for settlement, though not the date of the reception of the money by the guardian, was within the period of limitation, the affidavit was sufficient, and that a prosecution instituted December 19th, 1890, was not barred by the statute.

Held, also, that an averment in the information, that the accused fled from the county and concealed himself, is not sufficient to avoid the operation of the statute of limitations, where there is no averment as to how long the absence or concealment continued. *Colvin v. State, 403*

15. *Enticing Female to House of Ill-Fame.—What is, and is not, the Offence.—"For the Purpose of Prostitution."—"Or Elsewhere."*—The statute making it an offence to entice or take a female of previous chaste character to a house of ill-fame, "or elsewhere," "for the purpose of prostitution," has no application to persons who entice, allure or solicit females of chaste character to accompany them to any convenient place for the sole purpose of having illicit intercourse. It applies to such persons only as allure chaste females to houses of ill-fame, or other places of like character, to have common, indiscriminate, meretricious commerce with men, or where they may become prostitutes. The phrase "with the intent of then and there rendering her a prostitute," in an indictment, is the equivalent of the phrase "for the purpose of prostitution." Section 1993, R. S. 1881. *Nichols v. State, 406*

16. *Indictment.—Insufficiency.*—An indictment charging that the defendant, at a certain date, in a certain county, enticed and took a cer-

tain named female of chaste character, then and there being, to a certain named city of the State, with the intent then and there of rendering her a prostitute, without designating or describing the particular house or place in such city to which she was taken or enticed, is not sufficient to withstand a motion to quash, but is sufficient to withstand a motion in arrest of judgment. *Ib.*

17. *Same.*—*Indictment.*—*Arrest of Judgment.*—If an indictment or information does not contain all the essential elements of a public offence, a motion in arrest of judgment will be sustained. But if it contains all such essential elements, even though imperfectly stated, it will be held sufficient to withstand such a motion. *Ib.*

18. *Same.*—*Presumption as to Proof.*—After verdict and judgment thereon, in case of a conviction, the Supreme Court assumes, in the absence of the evidence, where the pleading is broad enough, that there was proof of all the elements necessary to constitute the crime charged. *Ib.*

19. *Same.*—*Information.*—*Jurisdictional Facts.*—*Need not Show.*—It is not necessary to allege in an affidavit and information the facts showing the right of the State to thus prosecute the accused. If such facts do not exist a plea in abatement must be filed. Section 1733, R. S. 1881. *Ib.*

20. *Same.*—*Punishment Less than Statute Requires.*—A defendant can not object to a verdict which does not assess a fine in addition to the punishment assessed, even though the statute requires the fine also to be assessed. *Ib.*

21. *Burglary.*—*Value of Goods Stolen.*—*Evidence.*—On an indictment for burglary with intent to steal it is not error to admit proof of the value of the goods stolen, though such proof is unnecessary. *Farley v. State*, 419

22. *Same.*—*Instruction.*—*Presumption of Innocence.*—It is error to refuse the request of the defendant for an instruction that the presumption of innocence prevails throughout the trial, and that it is the duty of the jury, if possible, to reconcile the evidence with this presumption. *Ib.*

23. *Appeal by the State.*—*Instruction.*—*Review.*—In an appeal by the State, where there is no statement in the bill of exceptions showing that there was evidence to which the instructions requested were relevant, no question of law is presented upon the refusal of the request. *State v. Kern*, 465

24. *Mittimus.*—A delay of twelve days by the justice of the peace in performing his duty to commit to jail a defendant in a criminal cause who does not immediately pay or replevy a fine, does not render the *mittimus* void. *McLaughlin v. Etchison*, 474

25. *Assault and Battery.*—*Jurisdiction.*—*Circuit Courts.*—The act of March 9, 1889 (Acts 1889, p. 363), which provides that upon conviction of assault and battery, in the courts named in the section, the punishment shall be as therein stated, does not deprive the circuit court of jurisdiction of the offence. *Hinkle v. State*, 490

26. *Same.*—*Unreasonable Punishment of Child.*—*Verdict.*—*Review on Appeal.*—On a prosecution of a father for an assault and battery on his child, it appeared that the father chained his fourteen-year-old child to a sewing-machine, and left her thus alone in the house with her infant brother during the day. *Held*, that a verdict that the punishment was unreasonable and unlawful, will not be disturbed on appeal. *Ib.*

CROSS-ERRORS.

See PRACTICE, 4.

CROSS-EXAMINATION.

See WITNESS, 3.

DAMAGES.

See COMMON CARRIER, 2; HIGHWAY, 3; NEGLIGENCE, 3.

Child.—Parent's Right to Recover for Loss of Services.—Kindness and Attention to Family.—In an action by a father for the death of his child it is not error to instruct the jury that in estimating his damages they may consider the condition of his family at the time of the accident, take into account all the services the child might reasonably have performed in the family until it attained its majority, including actual labor in helping to carry on the household affairs, the pecuniary acts of kindness and attention which might reasonably be anticipated that it would have performed which would administer to the family's comfort as well as their necessities, if accompanied by the statement that they can not consider the fact that the father has been deprived of the happiness, comfort and society of his child, nor acts of affection simply and loss of companionship, and that the recovery is limited by law to the actual pecuniary loss.

Louisville, etc., R. W. Co. v. Rush, 545

DEBTOR AND CREDITOR.

See FRAUDULENT CONVEYANCE; JUDGMENT, 6; LIFE INSURANCE, 2.

DECEDENTS' ESTATES.

1. *Law Favors Equal Distribution of Estate.—Per Stirpes or Per Capita.*—The law favors an equal distribution of an estate among the children of the deceased owner; and it favors a distribution between near and remote heirs *per stirpes* in preference to *per capita*. *Kilgore v. Kilgore, 276*
2. *Distributee.—Indebtedness of to Estate.—Distributive Share.—Exemptions.*—A distributee against whom the administrator holds an unsatisfied judgment for a sum greater than the distributee's distributive share, is not entitled to such share, although, being a householder, the property owned by him is not equal to the amount allowed by law as exempt from execution. *Fiscus v. Fiscus, 283*
3. *Widow.—Award.—May be Claimed out of Property Levyed on in Husband's Lifetime.*—The right of the widow to the five hundred dollars allowed her by section 2269, R. S. 1881, is not defeated by a levy made by the sheriff on the property of her deceased husband in his lifetime. *Dixon v. Aldrich, 296*
4. *Claim.—Time of Filing.*—A claim not filed within thirty days before final settlement of the estate is barred, and the fact that it is on file before the final settlement report is approved does not delay the settlement. *Schricker v. Stiles' Estate, 472*
5. *Same.—Administrator's Charges.—Who May not Object to.*—One who has no interest in the estate as creditor or otherwise can not object to the charges made by the administrator on account of services rendered by himself and his counsel. *Ib.*
6. *Heir's Share of Proceeds Set Off Against Debt Due Estate.*—A debt due the estate from a legatee may be retained out of his distributive share of the surplus proceeds of the estate and applied to the payment of a debt due the estate from such heir, although such indebtedness arose after the death of the decedent. *New v. New, 576*

DECLARATIONS.

See BASTARDY, 2.

DEDICATION.

1. *Sufficiency of.*—All that is necessary to constitute a dedication of land

to a public use is the assent of the owner of the soil to the use by the public, and the actual enjoyment by the public of the use for such a length of time that public accommodation and private rights would be materially affected by a denial or interruption of the enjoyment.

Town of Marion v. Skillman, 130

2. *Same.*—*Intent.*—To make a dedication complete, an intent on the part of the owner to dedicate must clearly appear. *Ib.*
3. *Same.*—*Assent of Owner.*—The assent of the owner to the public use need not be expressly declared, nor be manifested in any particular manner, but may be implied from the conduct of the owner of the land. *Ib.*
4. *Same.*—*Implied.*—An implied dedication arises by operation of law from the acts of the owner of the land. *Ib.*
5. *Same.*—*Irrevocable.*—A dedication once made is irrevocable; it is considered as in the nature of an estoppel *in pais*. *Ib.*
6. *Same.*—*Use for Twenty Years Without Intent to Dedicate.*—Twenty years' use by the public under a claim of right, evidenced by the use, gives a right to the road or street of which the owner of the fee can not divest the public, whatever his intention may have been, not because an intent to dedicate is conclusively presumed, but because the statute of limitations has divested the owner of a right by destroying the remedy. *Ib.*
7. *Same.*—*Width of Street Dedicated.*—*Example.*—North of a small unplatted tract of land in a town was a platted tract, and south of it a tract similarly platted, both plats within the town limits. A platted street in the north plat extended south to the north line of the unplatted tract; and a similar platted street, of the same width and name, began at the south line of such unplatted tract, in a direct line with the north street, and extended south through the south plat. That portion of the unplatted tract lying between where the street ended on the north and the other commenced on the south was unfenced and unoccupied to the full width of the streets, except a narrow strip on the west side covered by a hotel. Such had been the condition of the three tracts of land for more than twenty years, and the public had used the two streets, and the space across the unplatted tract as a street, for that length of time.

Held, that there was a dedication of a strip across the unplatted tract to the full width of the two streets, except that portion occupied by the hotel, and that the three parts constituted one street. *Ib.*

DEED.

1. *Construction.*—*Life-Estate and Remainder.*—*Rule in Shelley's Case.*—The grantor conveyed to the grantee by deed certain real estate, "for life, and after his death to the then living children of his body;" a right to a living off the real estate was reserved to the grantor, it being expressly understood that "the grantee is to have no greater interest than a life-estate, and that at his death said tract shall go to the children of his body then living."

Held, that the rule in Shelley's Case does not apply, and that the grantee took only a life-estate, and that the children, who were living at the time of the making of the deed, and at the death of the grantor, took the fee.

Jackson v. Jackson, 346

2. *Of Insane Person.*—*Action to Set Aside.*—*Disaffirmance.*—*Pleading.*—*Complaint.*—A complaint in an action by heirs to set aside the deed of their ancestor, on the ground that he was of unsound mind when the deed was executed to the defendant, which fails to allege the disaffirmance of the deed before the commencement of the suit, is de-

murrable. *Hull v. South*, 109 Ind. 315, and *Lange v. Dammier*, 119 Ind. 516, distinguished. *Ashmead v. Reynolds*, 441

3. *Same.*—*Pleading.*—An averment that the defendant, after the death of the ancestor, took possession of the land over the objection of the plaintiffs, is not a sufficient averment of disaffirmance, where the ground of objection is not shown. *Ib.*

DEMAND.

See **TRUST AND TRUSTEE**, 2.

DEPOSITION.

Suppression of Part of Answer.—The suppression of a part of a witness's answer to a question propounded to him in taking a deposition, which has the effect of completely destroying his answer thereto, is error. *McCormick v. Smith*, 230

DESCENT.

See **WILL**, 5, 8 to 11.

1. *Childless Second Wife.*—*Interest of as Widow.*—*Forced Heirs.*—Prior to the act of March 11, 1889, a childless second wife took an interest equal to the undivided one-third in fee simple in her deceased husband's real estate. During her lifetime the children of her husband had no vested estate in the property which descended to her, but at her death they became her heirs by compulsion of law. *Habig v. Dodge*, 31

2. *Same.*—*Partition.*—*Title not in Issue.*—In a suit for partition by one of the children of the deceased husband against the widow and the other children, if the title is not directly put in issue by the pleading, a decree adjudging the widow was entitled to an estate for life is not conclusive as to her interest. *Ib.*

3. *Same.*—*Warranty by Heirs Apparent.*—Where one of the children of the deceased husband executes a warranty deed to her expected interest in the widow's one-third and dies before the widow, such warranty deed does not bind her children, and they are not estopped to set up their title as the heirs of the widow, at the widow's death. *Ib.*

4. *Same.*—*Warranty Deed.*—*Estoppel.*—Where one of the children assumes to convey and warrant the title to a reversionary interest equal to the undivided one-third of the real estate previously set off to the widow, the grantee acquires by the deed a one-third interest in the land, subject to the estate of the widow and the grantor, and all those claiming through him are estopped to assert the contrary. *Ib.*

5. *Interest of Childless Second Wife.*—*Reversionary Interests of Heirs.*—*Rights of Creditors.*—The act of March 11th, 1889, provides that where a man marries a second wife, and has by her no children, and dies, leaving children by his first wife, the interest of such second childless wife in the lands of the decedent shall be only a life-estate, and the fee of the same shall, at the death of such husband, vest in such children, subject only to the life-estate of the widow.

Held, that the portion of the land in which the widow takes a life-estate is free from the demands of creditors, and is not subject to be made assets by sale for the payment of debts.

Held, also, that where all the lands of the decedent are, with the consent of the widow, sold to make assets, she is entitled to the value of her life-estate out of the proceeds of the portion subject to the life-estate, and that the children are entitled to the remainder of the proceeds of such portion. *Windell v. Trotter*, 332

6. *Nephews and Nieces.*—*Take per Capita, and not per Stirpes.*—The nephews and nieces of an intestate, being next of kin, inherit directly from him, and not through their parents, and, all standing in the same degree of relationship, take in equal portions. *Baker v. Bourne*, 466

7. *Guardians' Sale of Real Estate.—Widow's Rights.—Valuable Improvements.*—A husband, after taking a conveyance of land, became insane. His guardians then sold the land to pay part of the purchase-money due therefor, and other debts of the husband. The proceeds remaining after the payment of the debts and the purchase-money were re-invested in other lands.

Held, that as the special finding shows that the husband was insane, and that the land was conveyed by his guardians, it will be presumed that she did not join in the guardians' deed, not being authorized by statute so to do.

Held, also, that the sale of the land to pay the balance of the unpaid purchase price of the land and the other debts due from the husband did not bar the widow's interest in the land upon the death of the husband, and that she was entitled to one-third thereof.

Held, also, that the widow was not entitled to any interest in the increased value of the land occasioned by the valuable and lasting improvements made between the date of the guardians' sale and the death of her husband.

Davis v. Hutton, 481

DESCENT AND DISTRIBUTION.

See DECEDENTS' ESTATES.

DESCRIPTION.

See LEASE; STATUTE, 3.

DISAFFIRMANCE.

See DEED, 2.

DRAINAGE.

1. *Repairs.—Assessments.—Appeal.—Evidence.*—Under section 1193, Elliott's Supp., relating to the repair of ditches by the county surveyor, on an appeal to the circuit court from an assessment made by the county surveyor, apportioning the expense of repairing a ditch, evidence that the money expended by the surveyor was for excavating and repairing a ditch on a different line from that designated in the original specifications, is admissible. *Taylor v. Brown*, 293
2. *Authority of Drainage Commissioners.—Objections.*—The authority of drainage commissioners to act in the matter of opening a ditch can not be questioned for the first time by a motion for a new trial. *Goodwin v. Leak*, 569
3. *Same.—New Trial.*—It is no ground for granting a new trial to the appellant that other lands than his were not properly assessed. *Ib.*

DRAINAGE COMMISSIONERS.

See DRAINAGE, 2.

DURESS.

See LIFE INSURANCE, 2.

EASEMENT.

1. *License.—Revocation.*—The lands of plaintiff and defendant, adjoining owners, were so situated that surface and spring water collected on defendant's land was discharged upon the plaintiff's land. Pursuant to an oral agreement they constructed a drain, each constructing the distance required on his own land. The drain thus constructed was beneficial to the plaintiff's farm.

Held, that the effect of the agreement, when acted upon by the parties, was to create mutual licenses in favor of each in the land of the other, and that the plaintiff having expended money, in reliance upon the

agreement, the defendant was liable in damages for digging up the drain on his land and terminating the arrangement.

Ferguson v. Spencer, 66

2. *Owner of Servient Estate.*—*Proof of Disability.*—While a right can not be acquired by prescription against one under disabilities, the person claiming the right is not required to aver and prove that the owner of the servient estate was not under disabilities. If disability is relied on as a defence it must be established by the party asserting it, as disability is not presumed. *Fankboner v. Corder*, 164
3. *Same.*—*Ways.*—*Prescription.*—Where there is a continuous and uninterrupted use of a private way over the land of another by an adjoining owner for more than twenty years, and the owner of the dominant estate during such time expends money in improving the way, and the owner of the servient estate marks its boundaries and fences it, a title to the way by prescription is established. *Ib.*
4. *Same.*—*Intersection of Private Way with Public Road.*—*Erection of Gate.*—The owner of the servient estate has no right to erect a gate at the place where a private way acquired by prescription intersects a public road, where no gate was erected during the requisite term for acquiring the way. *Ib.*
5. *Same.*—*Purchaser of Servient Estate with Knowledge.*—One who takes an estate upon which a servitude has been imposed, with knowledge of its existence, holds it subject to the same servitude and in the same manner as it was held by his grantor. *Ib.*
6. *Right of Way.*—*Obstruction.*—*Suit to Enjoin—Pleading.*—A complaint in a suit to enjoin the obstruction of a private way which bases the right of the plaintiffs to the way on two grounds, a right of necessity and a right by prescription, states but a single cause of action, as the cause of action rests upon the threatened obstruction. *Harding v. Cowgar*, 245
7. *Same.*—*Pleading.*—*Complaint.*—Such a complaint, alleging that the way claimed is a well-defined road, thirty feet wide, which had been in use for more than twenty years, and was then open and in use, is sufficiently specific without setting out the beginning, course and termini of the way. *Ib.*
8. *Same.*—*Prescription.*—In a suit to enjoin the obstruction of a private way a complaint which alleges that about fifty years prior to the commencement of the suit J. was the owner of the land described in the complaint; that he conveyed the land owned by the plaintiffs to R., through whom they claim; that J. afterwards conveyed the land owned by the defendants; and that for more than twenty years the plaintiffs and their grantors have enjoyed, as of right, and without interruption, a way over the land of the defendants, shows a right of way by prescription. *Ib.*
9. *Same.*—*Public Highway.*—*Obstruction of.*—*Abutting Owner.*—*Injunction.*—Where land is so situated with reference to a public highway that such highway is necessary to ingress and egress to and from such land, the owner has a private easement in the public highway, and may maintain an action for its obstruction. *Ib.*
10. *Same.*—*Complaint.*—*Necessary Averment.*—To maintain an action to enjoin the obstruction of such public highway it should be described in the complaint as a public highway. *Ib.*

ELECTION.

See WILL, 11.

INDEX.

EMBEZZLEMENT.

See CRIMINAL LAW, 14.

EMPLOYMENT OF TEACHER.

See SCHOOLS AND SCHOOL DISTRICTS, 3.

EQUITIES.

See SUBROGATION, 2.

Equal.—Priority of Time.—If the equities of two parties are equal, the one first in point of time is the superior one. *Paxton v. Sterne*, 289

ESTOPPEL.

See CHATTEL MORTGAGE, 3; FRAUDULENT CONVEYANCE, 6; HUSBAND AND WIFE, 2; LIFE INSURANCE, 2, 5; MARRIED WOMAN; WILL, 2.

EVIDENCE.

See BASTARDY, 1; COMMON CARRIER, 1; CRIMINAL LAW, 4, 6, 7, 10, 13, 21; DRAINAGE, 1; GUARDIAN AND WARD, 4; INJUNCTION, 2, 3, 5, 6; LEASE; MALICIOUS PROSECUTION; MORTGAGE, 1; NEGLIGENCE, 2, 3; PAYMENT, 1, 2, 4; SUPREME COURT, 1.

1. *General Objections.*—General objections to evidence are unavailing, and only such objections as are specifically stated will be noticed on appeal. *Litten v. Wright School Tp*, 81
2. *Same.—Witness's Interest.*—An objection that certain letters given in evidence were written after the notes in suit had been assigned, is unavailing where the letters are competent as tending to show the interest of some of the witnesses in the cause. *Ib.*
3. *Expert Testimony.—Instruction.—Weight.—Interest.*—An instruction that “The jury, in judging of the weight of expert evidence should consider the character of the witness and the interest, if any, he has in the case,” is erroneous. *Duwall v. Kenton*, 178
4. *Lease.—Executed Copy Admissible without Accounting for Original.*—A lease was duly executed by the parties. Some time afterward one of the parties had a copy made, and both parties then signed such copy. This copy, in an action to reform the lease, was attached to the complaint as an exhibit.

Held, that it was admissible in evidence without first showing the loss of the original lease. *Weaver v. Shipley*, 526

5. *Same.—In an action to reform the description in a lease, the statements of the parties while negotiating the lease, are admissible to locate the land and the terms upon which it was let.* *Ib.*

EXECUTION.

1. *Sale.—Separate Bids.—Holding in Abeyance.*—The sheriff, under an execution, first offered the lots for sale separately. The judgment debtor, through his attorney, bid for the separate parcels a sum insufficient to satisfy the execution, and the sheriff held the bids in abeyance until he offered the property as a whole. The debtor, whose bid on the property at that time was the highest, being unable to pay the full amount bid, the attorney, on the refusal of the sheriff to grant an extension of time, withdrew his last bid, and the property was sold to another for more than the aggregate amount of the separate bids.

Held, that the sale was valid, as there was no abuse of discretion by the sheriff. *Barnes v. Zoercher*, 105

2. *Judgment Obtained by Fraud.*—A party who pays a claim and enters into an agreement providing for the dismissal of the action brought on

the claim is guilty of a fraud if he subsequently causes witnesses to be subpoenaed and costs to be taxed against his adversary.

Greenwaldt v. May, 511

3. *Same.*—*Judgment for Costs.*—*Injunction.*—Equity will enjoin the collection of a judgment so obtained before a justice of the peace, as a justice of the peace has no authority to review his own judgment on the ground of fraud, and injunction is the only adequate remedy. *Ib.*

EXHIBIT.

See PARTITION, 2.

EX PARTE ORDER.

See GUARDIAN AND WARD, 1, 3.

EXPERT TESTIMONY.

See EVIDENCE, 3.

EX POST FACTO LAW.

See CRIMINAL LAW, 2.

FACTORS AND BROKERS.

Real Estate Agent.—*Exchange.*—*Commission from Both Principals.*—Where a real estate broker, with property in his hands for sale, brings together the owner thereof and another owner who employs him to make an exchange, he is entitled to compensation from the latter, if he acts in good faith, and the parties make their own bargain uninfluenced by his representations.

Cox v. Haun, 325

FEES AND SALARIES.

See COUNTY AUDITOR.

FINDING.

See INJUNCTION, 4.

1. *Special and General.*—Where the court is not asked to make a special finding, a finding made by it will be treated as a general finding.

Jacobs v. State, 77

2. *Special.*—*No Request.*—A special finding made by the court without a request by one of the parties will be treated only as a general finding.

Weaver v. Shipley, 526

FINE.

See CRIMINAL LAW, 20.

FORECLOSURE.

See MORTGAGE; REAL ESTATE, ACTION TO RECOVER, 1, 2; TAXES.

FORFEITURE.

See OFFICE AND OFFICER, 3.

FRANCHISES.

See CORPORATION.

FRAUD.

See PARTITION, 4.

1. *Special Finding.*—Fraud must be found and stated in a special finding as an inferential or ultimate fact, and it is not enough to state the badges, or evidences, of fraud.

Farmers, etc., Co. v. Canada, etc., R. W. Co., 250

2. *Concealment by Attorney of Material Fact.*—If an attorney misleads his client, who is relying upon him, by the fraudulent concealment of

material matters or by false statements, the transaction will be annulled by the courts. *McLead v. Applegate*, 349

FRAUDULENT CONVEYANCE.

1. *Trustee.*—*Lien of Judgment.*—*Proof of Consideration.*—*Assumption of Debt by Grantee.*—*Preference of Creditors.*—W. was indebted to M. who was in failing circumstances, and said M. was indebted to A., G., B., T., L., I. and others. I. had a judgment against M. on his debt. W. conveyed a tract of land to A., in consideration of A. paying W.'s debt to M. and assuming the debts of G., B., T. and L., and cancelling his own debt against M. M. assented to this arrangement.

Held, that it was error to refuse to allow W., after having fully testified to the arrangement, on cross-examination, to testify that part of the consideration was the assuming of M.'s debts to G., T. and others.

Held, also, that it was not error to allow him to testify on cross-examination that M. desired to pay his debts; that he was willing to agree to any arrangement to pay them off; that he, W., after seeing M., went to A. and A. agreed to take the tract at the price named by W. in payment of his debt from M., and that M. agreed to pay certain other of A.'s debts due to G., T. and others.

Held, also, that A. was not a trustee for W.; that I.'s judgment was not a lien on the land conveyed; that a sale of such land upon execution issued on said judgment was void, if the transaction was entered into and carried out in good faith; that it made no difference how A. paid L., G., B. and T., and that I. could not object on the ground that he was not a "preferred creditor." *McCormick v. Smith*, 230

2. *Action to Set Aside.*—*Pleading.*—*Necessary Averments.*—In a suit by a creditor to set aside a conveyance of property on the ground that it was made to defraud creditors, an averment that at the time the suit was brought the debtor had no property out of which the debt might be collected, or an averment equivalent thereto, is material and necessary, and its omission is fatal. *Brumbaugh v. Richcreek*, 240

3. *Same.*—*Debtor's Unsoundness of Mind.*—*Advantage Taken of by Grantee.*—A creditor can not avoid a conveyance made by his debtor solely because the debtor was of unsound mind when he made it. Nor does the fact that the grantee, knowing of the debt and of the debtor's mental weakness, took advantage of such weakness for the purpose and with the intention of thereby defrauding the creditor, authorize the creditor to appeal to a court of equity to set aside such deed, unless he is injured thereby. *Ib.*

4. *Action to Set Aside.*—*Rights of Creditors.*—A creditor can not maintain for his own benefit a suit to set aside a fraudulent conveyance made by a debtor who afterwards executes a voluntary assignment for the benefit of creditors where the trust is accepted and fully administered, although neither the assignee nor the creditor has any knowledge of the fraudulent conveyance until after the final settlement of the trust and the discharge of the assignee. *Voorhees v. Carpenter*, 300

5. *Assignment.*—*Creditors Preferred by Mortgages Given Them.*—*Part of Assignment.*—A debtor in failing circumstances and contemplating making an assignment of all his property for the benefit of his creditors, may prefer such of his creditors as he sees fit to do so, by executing to them mortgages upon his property to secure their debts; and if the transaction is in good faith it matters not how short an interval of time there is between the execution of such mortgages and the deed of assignment, so that the former, in point of time, in their execution, precede the latter. Such mortgages do not become a part of the assignment, and are not to be taken in connection with the deed thereof. *Curnahan v. Schwab*, 507

6. *Plaintiff Himself Having Conveyed Land Sought to be Reached is not Estopped.*—*Collateral Attack on Decree of Settlement.*—A father bequeathed his real and personal estate to his wife during her life, to be used and enjoyed by her as she might direct. The real estate, however, could not be sold nor disposed of until after her decease, unless it was necessary for her support and maintenance after the personal property had been exhausted. The rents and profits were given to the wife. After the death of his wife, all his real estate, and such of his personal estate as she had not consumed, were given, in equal parts, to his three children, John, George and Mary. His wife qualified as executor, and loaned George, of the assets of the estate, several thousand dollars, taking his notes due to herself personally. After his mother's death John qualified as executor of his father's will and recovered judgment on the notes in favor of his father's estate, and it was a part of the judgment that no execution should issue upon the judgment until the estate was settled. At the final settlement of the estate, this judgment against George was assigned, by decree of the court, to John, and it was decreed that there was due thereon from George to John a specified amount. In an action by John against George to subject the interest in the real estate which he had inherited from his father, and which it was alleged he had fraudulently conveyed to his wife, and that he was insolvent to this decree,

Held, that the complaint stated a good cause of action, and that there were not two or more causes of action improperly joined; that John was not estopped from subjecting the real estate that George had fraudulently conveyed to his wife to his claim, by reason of the fact that he, John, had himself conveyed all his interest therein by a warranty deed, he having the right to prosecute the action for the benefit of his grantee and to save himself from liability on his warranty; that the decree in the settlement of the father's estate settled the right of John to recover the balance due on the judgment against George, and that that fact could no longer be controverted.

New v. New, 576

7. *Same.*—*Statute of Limitations.*—*Practice.*—*Immaterial Error.*—The wife of George plead the six years' statute of limitations

Held, that the facts alleged in the complaint, which were not controverted and were matters of record introduced in evidence, showed that the cause of action arose within six years previous to the commencement of the action, and that there was no available error in sustaining a demurrrer to the answer.

Ib.

GOVERNOR.

See **MANDAMUS**, 2.

GRAND JURY.

See **CRIMINAL LAW**, 1.

GRAVEL ROAD.

1. *Assessment in Part Valid.*—*Injunction.*—If any part of an assessment for a free gravel road made against the land of an owner seeking to enjoin its collection is valid, he can not have an injunction until he has paid the part that is valid.

Loesnitz v. Seelinger, 422

2. *Same—Assessments are Several.*—*Judgment in Favor of One Land-Owner does not Aid Another.*—Assessments for the purpose of building a free gravel road are several and not joint; and the fact that some of the parties whose lands have been assessed for such improvement have procured a decree declaring the assessments, as to them, void, does not affect those who have procured no such a decree.

Ib.

3. *Same.*—*Part of Assessment Illegal.*—*Collateral Attack.*—*Rule as to Tax Illegal in Part does not Apply.*—The fact that a part of an assessment for a free gravel road is illegal does not render such assessment void, although the illegal can not be separated from the legal part; and such assessments can not be collaterally attacked, the remedy being by appeal. The rule applicable to a tax illegal in part and inseparably connected with the part that is legal, does not apply to such an assessment. *Ib.*
4. *Same.*—*Contract for Construction in Part Illegal.*—The fact that a contract for the construction of a free gravel road is in part illegal will not render the assessments void, nor will the fact that the cost of the work exceeds the estimates, render the assessments, within the estimate, void. *Ib.*
5. *Same.*—*Purchaser of Bonds not Responsible for Proper Application of Funds thus Raised.*—Assessments not being made to pay off the contractor, but to pay off the bonds issued to raise money to pay him, many objections that might otherwise be raised to the contractor's collecting such assessments can not be made when the county seeks to collect them. The purchasers of such bonds are not responsible for the proper application of the funds raised by the sale of the bonds. *Ib.*
6. *Same.*—*Effect of Judgment Approving Report of Assessment of Benefits.*—The order of the board of commissioners approving and confirming the report of the assessment of benefits and damages has the force and effect of a judgment against the owner of the land who has been properly notified, in so far as it affects the land, as much so as any other judgment of competent jurisdiction. *Ib.*

GUARDIAN AND WARD.

See CRIMINAL LAW, 14; TRUST AND TRUSTEE, 3, 4.

1. *Guardian.*—*Void Order of Removal.*—*Collateral Attack.*—An *ex parte* order of the circuit court removing a guardian, made without notice to the guardian, and without appearance by him, is void and may be collaterally attacked. *Colvin v. State, 403 State, ex rel., v. Wheeler, 451*
2. *Action on Bond.*—*Burden to Show Breach.*—*Exceptions to Report.*—*Burden.*—In an action on a guardian's bond the burden is on the relator to show a breach of its condition; but on exceptions to his report the burden is on him to show that the money expended was for the best interests of his ward. *State, ex rel., v. Wheeler, 451*
3. *Same.*—*Ex Parte Orders.*—*Effect.*—*Collateral Attack.*—*Ex parte* orders made by the court in a matter of a guardianship, whether by way of direction to the guardian, or of approval of action theretofore taken by him, are regarded as *prima facie* correct, but, as a rule, are within the control of the court making them until final settlement of the guardianship. At any time before final settlement and discharge of the guardian they may be set aside, corrected, or modified, but they can not be collaterally attacked, as in a suit upon the guardian's bond for a misapplication of the funds of the trust. The only attack that can be made upon them is in a direct proceeding in the court having control over them. *Ib.*
4. *Same.*—*Action on Bond.*—*Plea of Payment.*—*Evidence.*—In an action upon a guardian's bond for misapplication of the funds of the trust, under the general denial, the guardian may show an application of such funds pursuant to orders of the court, a plea of payment being unnecessary; and witness may testify to the payment of the money pursuant to such orders, and to the fact that he ascertained the amount by calculation required to be paid over. *Ib.*

GUARDIAN'S BOND.

See GUARDIAN AND WARD, 2 to 4.

GUARDIAN'S SALE.

See DESCENT, 7.

HABEAS CORPUS.

Erroneous Judgment.—*Imprisonment in Pursuance of.*—Where, pursuant to an erroneous judgment of conviction, the accused is committed to jail by a justice of the peace for failing to pay or replevy the fine, he is not entitled to a writ of *habeas corpus* to regain his liberty.

McLaughlin v. Etchison, 474

HARMLESS ERROR.

See FRAUDULENT CONVEYANCE, 7; PLEADING, 4; PRACTICE, 1.

HIGHWAY.

See COUNTY COMMISSIONERS, 2, 4; EASEMENT, 9.

1. *Vacation Proceedings.*—*Order Approving Report of Reviewers.*—*May beAppealed from.*—Where, in a proceeding to vacate a highway, viewers are appointed who report in favor of the vacation, and upon remonstrance reviewers are appointed who report against the vacation, an appeal will lie to the circuit court from the final order of the board approving the report of the reviewers, and the case may there be tried *de novo*. *McKee v. Gould*, 108 Ind. 107, and *Bowman v. Jobs*, 123 Ind. 44, distinguished. *Cook v. Quick*, 477
2. *Same.*—*Inutility of Highway—Finding.*—Where the circuit court, without the intervention of a jury, finds that a highway will not be of public utility, and that it should be vacated, this court will not disturb the finding where there is evidence to support it. *Ib*
3. *Same.*—*Damages for Vacation.*—*Court's Refusal to Allow—New Trial.*—A person through whose land an established highway is sought to be vacated is entitled to recover such damages as he may sustain by the vacation; and where the evidence is undisputed that such person is entitled to damages, the remonstrant should be given a new trial on the refusal of the court to allow damages. *Ib.*

HOUSE OF ILL-FAME.

See CRIMINAL LAW, 15.

HUSBAND AND WIFE.

See CONTRACT, 1.

1. *Bankruptcy.*—*Wife's Inchoate Interest.*—Where the land of a bankrupt was sold under an order made in the bankruptcy proceeding in 1878, the wife became the owner at the time of the sale of an absolute interest in the land. *Powers v. Nesbit*, 497
2. *Same.*—*Estoppel.*—Under the then existing laws a married woman could not lose title by estoppel in the lands of her husband. *Ib.*

IMPEACHMENT OF WITNESS.

See CRIMINAL LAW, 8; WITNESS, 1.

IMPROVEMENTS.

See LANDLORD AND TENANT, 2, 3.

INDICTMENT.

See CRIMINAL LAW, 13, 16, 17.

INFORMATION.

See CRIMINAL LAW, 14, 18; OFFICE AND OFFICER, 3.

INJUNCTION.

See EASEMENT, 6, 9; EXECUTION, 3; GRAVEL ROAD, 1; MUNICIPAL CORPORATION, 1, 2; STATUTE OF FRAUDS, 3; STREETS AND ALLEYS, 1, 2.

1. *Pleading.*—*Answer.*—In an injunction proceeding to restrain a natural gas company from laying its pipes on the land of the plaintiff, an answer denying the ownership of the plaintiff and asserting title in a third person, from whom the defendant had permission to enter upon the land, is good. *Whitlock v. Consumers Gas Trust Co.*, 62 *Ib.*
2. *Same.*—*Evidence.*—*Nature of Threatened Injury.*—Evidence that the plaintiff had acquiesced in the occupancy of the land, and that she had offered to receive a certain compensation for allowing the defendant to construct its line of pipe, is competent, as tending to show the nature and extent of the threatened injury sought to be restrained. *Ib.*
3. *Same.*—*Evidence.*—A deed executed by plaintiff's grantor to a third person, conveying an interest in the land, is properly admissible in evidence as showing the character of the injury. *Ib.*
4. *Same.*—*Finding of the Jury.*—*Court May Disregard.*—An injunction proceeding is one of exclusive equitable cognizance, and the trial court is not bound by the finding made by the jury. *Ib.*
5. *Complaint as Evidence.*—A verified complaint, in an action for an injunction, submitted to the court on the trial as evidence in the case, will be treated as any other document put in evidence. *Chicago, etc., R. R. Co. v. Eisert*, 156

6. *Lease of Land for Tile Mill.*—*Use of Clay.*—*Evidence of Inability to Procure Clay Elsewhere.*—A. leased three certain tracts of land of B., one of which was insufficiently described in the lease, and from which tract A. had the right to take clay for tile. After he had taken out considerable clay for tile, B. threatened to enter on the insufficiently described tract, and he forbade A. to take any more clay. A. brought an action for an injunction to restrain B.'s interference with him in taking clay from such tract, alleging that he had erected valuable buildings upon the two other leased tracts, relying upon his right to take such clay, and that no other clay could be procured in that vicinity.

Held, that he was entitled to an injunction as prayed, and that evidence was admissible to show that no other clay could be procured in that vicinity. *Weaver v. Shipley*, 526

INSANE PERSON.

See DEED, 2; FRAUDULENT CONVEYANCE, 3.

INSANITY.

See WILL, 12.

INSTRUCTIONS TO JURY.

See BRIDGE; CRIMINAL LAW, 22, 23; EVIDENCE, 3; MASTER AND SERVANT, 3 to 5; PRACTICE, 3, 10, SUPREME COURT, 2.

1. *Improperly Expressed.*—*Refusal of Request.*—Unless the instruction asked is expressed in proper terms the trial court may refuse to give it; it is not bound to modify or amend it. *Rogers v. Leyden*, 500
2. Where it does not appear that all the instructions given are in the record, an objection that the court erred in refusing to give certain instructions asked, is unavailing. *City of New Albany v. McCulloch*, 500

INSURABLE INTEREST.

See LIFE INSURANCE, 1.

INTENT.

See DEDICATION, 2 to 4, 6, 7.

INTEREST.

1. *Liability of a State for.*—A State is not liable for interest upon its obligations unless it contracts to pay it in pursuance of a statute authorizing the contract. The general interest statute does not apply to the State. *Carr v. State, ex rel.*, 204

2. *Same. Interest after Debt Due. Compound Interest.*—A statute authorized the issue of bonds of the State bearing interest at the rate of five per cent. per annum, payable semi-annually. No coupons were issued for the interest. If any instalment of interest was not demanded at a certain named place before the expiration of thirteen months from the time it became due, the State had the right to pay it at its own treasury. The bonds were made payable at the end of twenty years from the time of their issue, and after twenty years the State might, at its pleasure, redeem them.

Held, that the bonds drew five per cent. interest after the expiration of the twenty years; but that interest upon (or compound) interest could not be recovered. *Ib.*

JUDGE.

1. *Inferior Court.*—A judge or magistrate of a court of inferior jurisdiction, acting in a matter which is within his jurisdiction, is entitled to the same immunity accorded to a judge of a court of general jurisdiction. *State, ex rel., v. Wolever*, 306

2. *Same.*—In such a case, a judge or a magistrate of a court of limited jurisdiction is acting within his jurisdiction if the court, over which he presides, has jurisdiction of the subject-matter, and he has acquired jurisdiction of the persons of the parties litigant. *Ib.*

3. *Same.*—A court of limited jurisdiction has jurisdiction of the subject-matter in a given case if it has jurisdiction of the class of cases to which the particular case belongs. *Ib.*

4. *Same.*—A magistrate or a judge of any court, whether of general or of limited jurisdiction, only exceeds his jurisdiction so as to incur civil liability where he acts wholly without jurisdiction, and where the authority which he assumes to exercise is a usurped authority. *Ib.*

5. *Same.*—Where a court of limited jurisdiction has jurisdiction in a given cause of both subject-matter and of the parties, an application for a change of venue, properly made and erroneously refused, will not render the judge or magistrate liable for thereafter assuming to retain jurisdiction and dispose of the case. *Ib.*

6. *Same.*—Deciding a motion for a change of venue is a judicial act, and the immunity accorded for such decision extends to the consequences legitimately flowing therefrom. *Ib.*

7. *Same. Mayor. Change of Venue Denied. Civil Liability.*—A mayor who maliciously, or corruptly, refuses to grant a change of venue, upon proper application made, in a case pending before him, is not liable, civilly, to the person applying for it, although such person be fined and imprisoned as a result of the trial. *Dietrich v. Schaw*, 43 Ind. 175; *Barkeloo v. Randall*, 4 Blackf. 476; *Krutz v. Howard*, 70 Ind. 174, doubted. *Ib.*

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JUDGMENT.

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1. *Collateral Attack.—Sufficiency of Notice by Publication.*—When notice is given by publication the judgment of the court acting upon such notice, that the publication and affidavit upon which it is based are sufficient to give it jurisdiction, is conclusive upon all parties as against a collateral attack. *Fontaine v. Houston*, 58 Ind. 316, *Brenner v. Quick*, 88 Ind. 546, and *Vizard v. Taylor*, 97 Ind. 90, denied. *Goodell v. Starr*, 198
2. *Interlocutory, What is Not.*—A submission of a case for trial to the court upon complaint and cross-complaint, with an agreement to allow all defences to be given in evidence, followed by a finding that the defendant's railroad ought to be sold, free of all encumbrance, to make assets to pay its indebtedness, and that the proceeds of the sale ought to be brought into court with leave to all parties to the action having liens, and all other lien-holders that may thereafter become parties to the action before final hearing, to establish their several claims, demands and liens, and their priority, as a lien upon the proceeds, and the rights of all such lien-holders ought to be transferred to the fund arising from the sale; followed by a reservation that the court reserves for its future adjudication the consideration and determination of the amount of the claims and liens and their priority as liens upon the proceeds of the sale, followed by a final decree, is not an interlocutory decree, but is conclusive upon the parties. *Farmers, etc., Co. v. Canada, etc., R. W. Co.*, 250
3. *Sale of Railroad.*—A personal judgment against a railway company must be enforced against the entire railroad by a sale thereof, and not by a sale of an isolated part. *Ib.*
4. *Same.—Lien.—Defendant Having no Title to Land.*—If the defendant has no legal title to the land the judgment against him is not a lien thereon. *Paxton v. Sterne*, 229
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JURISDICTION.

See CRIMINAL LAW, 25; TAXES, 1.

Presumption.—If a court of general jurisdiction, having jurisdiction over the subject-matter of the action, render judgment in the cause, it will be presumed, in the absence of a showing to the contrary, that the jurisdiction was acquired in some legal manner over the person before the rendition of such judgment. *Nichols v. State*, 406

JUROR.

See JURY, 2.

1. **Misconduct.**—*New Trial.*—Where a juror, when asked if he had served as a juror in a former trial of the same case, answered that he had not, and thereupon was accepted as a juror, without objection from the plaintiff, who was present at the former trial and testified as a witness, and knew that the juror had served on the former trial, when he answered that he had not, a new trial will not be granted for the misconduct of the juror, as it was the plaintiff's duty to object at the time. *Buck v. Hughes*, 46

2. **Misconduct of.**—*New Trial.*—Misconduct of a juror in separating from the other jurors, after they had retired to deliberate of their verdict, without the permission of the court, and remaining out of sight of the bailiff and the other jurors for a half hour, when it appears that during such absence he did not communicate with any one in relation to the case or upon any subject connected therewith, is not such misconduct as to authorize a new trial. *City of New Albany v. McCulloch*, 500

JURY.

1. **Misconduct.**—The decision of the trial court that the jury is not guilty of such misconduct as justifies the granting of a new trial will not, as a rule, be reversed by the Supreme Court. *Stevens v. Stevens*, 559

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2. *Same.*—*Tenants in Common.*—*Improvements Made and Services Rendered in Absence of Contract.*—One tenant in common can not charge his co-tenant for improvements voluntarily made upon the joint estate, nor for voluntary services in managing it. *Ib.*
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4. *Same.*—*Counter-Claim.*—*Pleading.*—In an action for rent an answer in the nature of a counter-claim, alleging that the plaintiff is indebted to the defendants for labor performed in paying taxes, without alleging that the defendant furnished the money with which they were paid, is bad. *Ib.*

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LEASE.

See INJUNCTION, 6; STATUTE OF FRAUDS, 3.

1. *Reformation.*—*Indefinite Description.*—*Parol Evidence to Complete.*—A lease, or contract, for the conveyance of land must, to be enforced contain a description of the land; and if the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, unless a new description is introduced into the body of such lease, or contract. Such evidence is admissible only in aid of the lease, or contract, not to contradict it, nor to first describe the land, and then to apply the description. *Weaver v. Shipley*, 526
2. *Same.*—“*Three-Cornered Tract.*”—A lease of a tract of land described as “the three-cornered tract,” in a certain described tract, is void, and the description of such three-cornered tract can not be supplied by parol evidence. *Ib.*

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3. *Same.*—*Payable out of Specific Part of Fund.*—*Failure to so Decree not Error.*—A mechanic holding a lien awarded his full claim out of a fund in court can not complain because it was not made payable out of the allowance made to another claimant of a part of the fund. *Ib.*
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Liens on Corporate Property.—Creditors obtaining a general equitable lien against an insolvent corporation upon funds brought into court for distribution, have a lien only against the corporation and its shareholders and not against lien-holders who have specific prior liens upon the corporate property created before the court received the fund. *Ib.*

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2. *Same.—Judgment Debtor.—Assignment of Policy.—Duress.—Estoppel.*—Where a debtor assigns a policy of insurance on his life to his creditor to secure a debt, and acquiesces in the assignment for many years, taking no steps to avoid it, and knowing that it was necessary to pay the premiums to keep it alive, he can not, in a suit on the policy, avoid the assignment on the ground of duress. *Ib.*
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Germania L. Ins. Co. v. Lunkhenheimer, 536

4. *Same.—Failure to Read Application Prepared by Agent of Insurer.—Reformation of Application.*—An assured, who has fully, truthfully, and in good faith answered all the required questions put to him by the agent of an insurance company, is not guilty of negligence in signing the application when such agent has prepared it, without reading it. It is immaterial whether the agent acted dishonestly or mistakenly. Nor is it necessary to reform such application in order to secure a recovery on the policy. *Ib.*
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MARRIED WOMAN.

Contract of Suretyship.—*Estoppel*.—A husband and wife executed a second mortgage upon two parcels of land, one of which was owned by the husband and wife jointly, the other by the husband in severalty, to indemnify the mortgagees against loss as sureties for the husband. To enable the husband and wife to borrow money to discharge the lien of the first mortgage and thereby to avoid a threatened foreclosure, the indemnifying mortgage was released on the agreement of the husband and wife to execute a junior mortgage in place of the released mortgage, and assign to the mortgagees, as collateral security, a note belonging to the wife.

Held, that the wife was the surety of the husband in the entire transaction; that she was entitled to the possession of the note pledged as collateral security, not being estopped to assert her right to the possession, as the mortgagees, with knowledge of the facts, were chargeable with knowledge of the legal consequences. *Wolf v. Zimmerman*, 486

MASTER AND SERVANT.

1. *Known Danger*.—*Assumption of Risk*.—An employee assumes all the risks incident to the service into which he enters, but where the negligent breach of duty on the part of the employer augments the hazards of the service the employee may, unless by voluntarily continuing in the employer's service he has assumed such danger, hold the employer accountable for an injury caused by such negligent breach of duty. *Rogers v. Leyden*, 50

2. *Same*.—*Concurrent Negligence of Master and Fellow-Servant*.—Where the master is negligent he is responsible, although the negligence of a fellow-servant may have concurred in bringing injury upon the plaintiff. *Ib.*

3. *Same*.—*Continuance in Service After Danger Increased*.—*Instruction*.—An employee who voluntarily remains in his employer's service after its danger has been increased by the employer's negligence, can not recover, since he assumes the risk from such known danger; but this rule does not apply where the employer promises to take steps to remove the threatened danger. Hence, it is not error to refuse an instruction unqualifiedly asserting that if the employee remains in the service after he acquires knowledge of the increased danger he can not recover. Such instruction is erroneous also for the reason that knowledge that a master is not discharging his duty in making safe the place where he requires his employees to work will not defeat a recovery by an employee injured by the master's neglect of duty, unless it is inferable that the breach of duty augmented the dangers of the service. *Ib.*

4. *Same*.—Both the question as to whether there was a negligent breach of duty by the employer, and the question as to whether such a breach of duty increased the dangers of the service, are, generally, questions of fact. If only one inference can be drawn from the facts, and the facts are uncontested, the question may be one of law; but where the facts are controverted, or where more than one inference may be reasonably drawn from the facts, the question is, generally, one of fact for the jury. Where more than one inference may be drawn from

the facts established by the evidence, the questions as to what inferences shall be deduced are, usually, questions of mingled law and fact, and must be submitted to the jury under appropriate instructions as to the governing rule of law. *Ib.*

5. *Same.*—*Contributory Negligence.—Assumption of Risk.—Instruction.*—Where it is a material question whether the employee, having knowledge of the danger, assumed it as one of the risks incident to his service, an instruction treating the employee's knowledge as affecting only the question of contributory negligence, while erroneous, is not ground for reversal, where other instructions treat his knowledge as affecting the assumption of the risk, and the jury find specially that the employee did not have knowledge of the increased peril. *Ib.*

MA YOR.

See JUDGE, 7.

MECHANIC'S LIEN.

See CONSTITUTIONAL LAW, 2; RAILROAD, 4 to 10; SUB-CONTRACTOR.

1. *Provision for Enforcement.*—A mechanic who repairs a chattel has a lien upon it, which he may enforce under sections 5304 and 5305, R. S. 1881. The former section does not declare a lien, but provides the manner of enforcing the common law lien given to a mechanic making repairs on a chattel. *Watts v. Sweeney*, 116 *Ib.*

2. *Same.—Statute Liberally Construed.*—The statute providing for the enforcing of the lien upon the article repaired must be liberally construed. *Ib.*

3. *Same.—Mechanic Furnishing Materials.*—A mechanic who furnishes the materials with which to alter or repair a chattel intrusted to him for that purpose has a lien thereon, as much so as if the owner of such chattel furnished such materials. *Ib.*

4. *Same.—Priority of Mechanic's and Chattel Mortgage Liens.*—If a mortgagor, by the terms of the mortgage, retains for a long time the possession of the chattel mortgaged, and retains it long after the debt secured is due, for the purpose of earning money with which to pay off the mortgage debt, the presumption is that such chattel is to be kept in repair; that it would be intrusted to a mechanic to make the necessary repairs, and such mechanic has a lien for such repairs that is superior to the lien of the mortgagee. *Ib.*

5. *Same.—Mortgagor Agent of Mortgagor.*—If a mortgagor, even by the terms of the mortgage, permits the mortgagor to retain the property mortgaged for a long period of time, when it is property, as a railroad locomotive, liable to need repairing, the court will presume that he constituted the mortgagor his agent to employ a proper person to make such repairs when necessary, and the lien thus created will be held superior to the mortgage lien. *Ib.*

6. *Same.—Sale to Enforce a Mechanic's Lien.*—A sale under sections 5304 and 5305, R. S. 1881, when their terms have been complied with, passes to the purchaser a complete title to the property purchased. *Ib.*

7. *Same.—Quieting Title to Personality.*—A defendant, who has a title to a chattel which is superior to the lien of a chattel mortgage thereon, may file a cross-complaint in a foreclosure proceeding to quiet his title thereto; and if the plaintiff dismiss such proceeding the defendant may proceed on his cross-complaint to quiet his title to such chattel. *Ib.*

8. *Repeal of Statute.—Enforcement of Lien.*—The right to a mechanic's lien is determined by the statute in force when the material is furnished or the labor performed. Such lien can not be taken away nor the

remedy for its enforcement materially impaired; and if the statute giving it is repealed the courts will still enforce it in accordance with the remedy given by such repealed statute; yet, if the repealing statute provides an adequate remedy, the lien must be enforced by the law existing at the time of bringing the action.

Goodbub v. Estate of Hornung, 181

9. *Same.*—*Presumption as to Time Material was Furnished.*—In an action to enforce a mechanic's lien, where a note had been given for the amount of material furnished or labor performed.

Held, that the presumption was, in the absence of evidence, that the last of the material was furnished and the last of the labor was performed at the time the note bore date. *Ib.*

10. *Same.*—*Insolvent Owner of Building.*—*Preferred Claims.*—The act of March 9, 1889 (Acts 1889, p. 257; Elliott's Supp., section 1705) gives a preference, where the owner of the building is in failing circumstances or insolvent, both to the laborer and to the material man. *Ib.*

11. *Same.*—Such preference will not entitle the holder of the preferred claim to payment in full out of the general assets of the estate, but it is a specific preference reaching only the specific fund derived from the property to which the lien would attach. *Ib.*

12. *Same.*—*Failure to Give Notice—Amendment of 1889.*—*Preferred Claims.*—Material was furnished while the act of March 6, 1883 (Acts 1883, p. 140; Elliott's Supp., section 1688) was in force, which act required notice of intention to hold a lien to be given within sixty days after the material was furnished. Fifty-seven days after the material was furnished for a house, the act of March 9, 1889 (Acts 1889, p. 257; Elliott's Supp., section 1705) was amended, which amendment provided, in addition to the provisions of the act of 1883, for the acquisition of a lien whether notice was filed or not; and, in case of the insolvency of the owner of the building, that the claims of the material man or laborer should be a preferred debt.

Held, that the failure to give notice before the act of 1883 was repealed did not prevent the foreclosure of the lien acquired in furnishing the materials, that such lien could be enforced without giving notice, and, the owner of the building being insolvent, that the claim could be enforced as a preferred one. *Ib.*

13. *Right to.*—*Compliance with Statute—Results.*—The acquisition of a mechanic's lien results from a compliance with the requirements of the statute, and is not affected by the consequences which flow from its acquisition. *Farmers, etc., Co. v. Canada, etc., R. W. Co.*, 250

14. *Same.*—*Enforcement.*—Over the question of enforcement the holder of a lien has no control. He has a right to have it enforced as the law directs, and not otherwise. He must pursue the terms of the statute. *Ib.*

15. *Notice.*—*Sufficiency of.*—A notice from a material man of his intention to hold a lien "for work and labor done and material furnished by me in the construction and erection of said house, which work and labor done and material furnished was done and furnished by me at your special instance and request," sufficiently shows that the material was furnished for the owner's building. *Newhouse v. Morgan*, 436

16. *Same.*—A notice to the owner from a material man of his intention to hold a lien is sufficient, whether oral or written, if it puts the owner on his guard, and enables him to take steps to protect himself against loss. *Ib.*

MERGER.

See **CONTRACT**, 3.

MISCONDUCT.

See ARGUMENT OF COUNSEL; JUROR; JURY, 1.

MITTIMUS.

See CRIMINAL LAW, 24.

MONOPOLY.

State or Municipality Granting.—*Constitution.*—As a general rule neither the State nor a municipal corporation can grant or create a monopoly. The clause in the Constitution forbidding the granting of “privileges or immunities which upon the same terms shall not equally belong to all the citizens,” does not declare all monopolies unlawful. That clause applies only to such things as are of common right, and is merely to be applied to such things as are in their nature a monopoly. *Indianapolis, etc., R. R. Co. v. Citizens, etc., R. R. Co.*, 369

MORTGAGE.

1. *Action to Foreclose.*—*Plea of Payment.*—*Sufficiency of Evidence.*—In an action on a mortgage alleged to have been lost, where, as tending to establish a plea of payment, one witness testifies that the plaintiff told him that “the mortgagor had lifted the mortgage,” and another testified that she saw the mortgage in the possession of the mortgagor, a verdict for the defendant will not be disturbed as unsupported by the evidence. *Daubenspeck v. Pool*, 364
2. *Reformation After Foreclosure and Sale.*—Where, by mutual mistake of the parties, the description of the mortgaged premises is so defective that no title will pass under a sale, or where, by such mutual mistake, land is described which does not belong to the mortgagor, instead of land which does, there may be a reformation of the mortgage even after sale. *Ray v. Ferrell*, 570
3. *Same.*—*Debt Extinguished by Sale of Land under Decree.*—In case of such a mutual mistake in the land intended to be mortgaged, yet if land is mortgaged which is owned by the mortgagor, and there is a foreclosure, sale and purchase thereunder by the mortgagee, and the amount of the bid is the amount of the debt due, and the land purchased is worth in value the amount of the bid, the debt is paid, the mortgage extinguished, and there can be no reformation. *Ib.*

MUNICIPAL CORPORATION.

See CONSTITUTIONAL LAW, 1.

1. *Street Improvement.*—*Enjoining.*—Before the courts will, at the suit of an abutting land-owner, enjoin municipal authorities in making street improvements, at the public expense at least, it must be shown that there has been a clear invasion of the rights of such complaining land-owner. *Town of Marion v. Skillman*, 130
2. *Same.*—*Irreparable Injury.*—Before an injunction will be granted, in such an instance, it must be shown that unless granted the abutting lot-owner would suffer irreparable injury. *Ib.*
3. *Same.*—*Power to Assess for.*—A city or town can not compel abutting land-owners to pay for street improvements unless empowered so to do by statute; and when so empowered, the statute will be strictly construed. *Ib.*
4. *Same.*—*Improvement at Public Expense.*—The power to make street improvements, to be paid for out of the city or town treasury, is liberally construed; and it is the exercise of a corporate function that is implied from the general words of the act of incorporation. *Ib.*
5. *Same.*—*Repairing.*—Power to assess abutting lot-owners with the cost

of grading and paving a street does not, of itself, authorize a city or town to assess such owners with the cost of repairing such street. *Ib.*

6. *Same.*—*Narrowing Improvement of Sidewalk.*—A city or town is not compelled to pave a sidewalk to the full width it has been formerly paved, from that fact alone; but it may narrow such improvement when it repaves it. *Ib.*

7. *Same.*—*Width of Sidewalk.*—Town trustees have the power to determine what the width of a sidewalk shall be; and they are not required to make it of uniform width throughout the entire length of the street, nor to make the improvement of such sidewalk for the entire length of a uniform width. *Ib.*

8. *Defective Sidewalk.*—*Action for Personal Injuries.*—*Contributory Negligence.*—In an action for damages for injuries resulting from a fall into a cellar-way in defendant's sidewalk, the fact that plaintiff was blind does not authorize the conclusion that he was guilty of contributory negligence as against an averment that he was free from fault.

9. *Same.*—*Safety of Streets.*—*Not Insurer of.*—A municipal corporation is not an insurer of the safety of its streets, and to charge it with liability for injuries resulting from defects in its streets it must be affirmatively shown that the municipality was guilty of negligence. *Ib.*

10. *Same.*—*Negligence.*—*Question of Fact.*—It can not be adjudged as a pure matter of law that, irrespective of all questions of locality and surroundings, a municipal corporation is liable for an injury received by a person who falls into an opening made for a stairway where the entrance only is left open. *Ib.*

11. *Defective Sidewalk.*—*Personal Injuries.*—*Pleading.*—*Complaint.*—A complaint against a city to recover for an injury in consequence of a defective sidewalk, which alleges that a sidewalk had been negligently left out of repair and unsafe for use, of which the city had notice for more than a month; that while plaintiff was carefully walking along it in the night-time, it gave way under his weight, by reason of its decayed condition, and he was, without fault on his part, precipitated down an embankment, sustaining injuries, states a cause of action. *City of New Albany v. McCulloch, 500*

12. *Same.*—*Failure to Place Signals.*—Such complaint is not defective for failing to allege that proper signals of the dangerous condition of the sidewalk were negligently omitted to be placed so as to warn travellers of its dangerous condition. *Ib.*

13. *Same.*—*Defence Admissible under General Denial may be Struck Out.*—An answer to such complaint, pleaded with the general denial, which alleges that the plaintiff knew the defective condition of the sidewalk, but that, notwithstanding such knowledge, he voluntarily, and of his own free will, ventured to travel on the same, and assumed the risk of his journey thereon, may properly be stricken out, since it alleges only such matters as are admissible under the general denial. *Ib.*

14. *Same.*—*Defence.*—In such action an answer alleging that the city was indebted up to the constitutional limit, and had no funds available for the repair of its streets and sidewalk, presents no defence, since a city has power under sections 3162, 3164, 3165, R. S. 1881, to repair its streets and sidewalks at the expense of adjacent property-owners. *Ib.*

MURDER.

See CRIMINAL LAW, 2, 4 to 11.

NEGLIGENCE.

See MUNICIPAL CORPORATION, 10.

1. *Personal Injury.*—*Fall Through Trap-Door in Store-Room.*—In an ac-

tion by the plaintiff against the defendants for damages resulting from injuries sustained by the plaintiff in falling through a trap-door in the store-room of the defendant, it appeared that on the occasion of the injury the plaintiff, a lady about fifty years old, and a stranger at the store, on her way to the rear of the store-room where the article she desired to purchase was kept, passed over a trap-door in front of the counter, used for entering the cellar, not noticing it; desiring a different grade of the article from that shown her she was directed toward the front; while she was looking at the first article the trap-door was opened for an employee to enter the cellar, and, as the custom was, the door was left open until he returned and another employee kept guard; the plaintiff started to go as directed, and not seeing the trap door or having any knowledge of its existence, fell through it and was injured. There was evidence that the plaintiff's eyesight was ordinarily good, and that her hearing was only slightly defective. As to the character of the warning given, whether sufficient or not, the evidence was conflicting.

Held, that the questions whether the plaintiff was guilty of contributory negligence, or whether the warning was sufficient, are for the jury, and that a verdict for the plaintiff will not be disturbed.

Brosnan v. Sweetser, 1

2. **Same.**—*Evidence.*—Where one of the defendants testified as to the necessity of maintaining the trap-door at the place where it was located and the impracticability of placing any railing around it or otherwise guarding customers against danger, except by having an employee to watch it when open, it was not error for the court to permit plaintiff's counsel, on cross-examination, to ask the defendant whether the trap-door could not have been placed back of the counter, and if it would not have been less dangerous at such point. *Ib.*
3. **Same.**—*Damages.*—*Value of Nurse's Services.*—*Evidence.*—In an action for damages for personal injuries the reasonable value of properly nursing and caring for the injured person is an element of damages. The testimony of the physician of the plaintiff as to the value of the services of the nurse who treated her during her illness caused by the injury, is competent, although the services were rendered gratuitously. *Ib.*
4. **Pleading.**—*Particularity.*—*Indefiniteness.*—In an action for negligence it is not necessary that the complaint specify, with any great degree of particularity, the elements entering into the cause of the action in order that it may withstand a demurrer. If the defendant desires a more particular statement, a motion that it be inserted is the proper practice. *Deller v. Hofferberth, 44*
5. **Same.**—*Steam Engine out of Repair.*—A steam engine in use which is so out of repair as to be in an unsafe condition for such use is a nuisance. *Ib.*
6. **Same.**—*Lessor not Liable.*—A lessor is not liable for an explosion of steam boilers he leases to a lessee caused by defects arising therein subsequently to the lessee's taking possession thereof, even though they be in such a condition that they will naturally become dangerous if the tenant fails to repair them. *Ib.*
7. **When Question of Law and when of Fact.**—Where an inference of negligence may, or may not, be reasonably drawn from admitted facts, the case is ordinarily for the jury under proper instructions, but where only one inference can be reasonably drawn from the facts the question of negligence is one of law for the court. *City of Franklin v. Harter, 446*
8. **Contributory.**—*Crossing Track.*—*Approaching Train Obscured by Cars Standing on Side-Track.*—A child seven years of age attempting to cross a

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railroad track at a street crossing, when a train standing on such crossing is so moved as to give a clear passage way, is not guilty of such contributory negligence as will defeat a recovery by its father, if another train on an opposite and parallel track, and only a few feet from the first track, unseen by the child, suddenly strikes and injures such child in attempting to cross the second track, when if it had remained standing between the tracks it would have escaped injury.

Louisville, etc., R. W. Co. v. Rush, 545

NEW TRIAL.

See DRAINAGE, 3; HIGHWAY, 3; PARTITION, 5.

Refusal of Application for Continuance.—The refusal of an application for a continuance on the ground of the absence of a witness is not cause for a new trial where the facts expected to be proved by the absent witness were proved by another witness as fully as it was possible to prove them.

Schlotter v. State, ex rel., 493

NOTICE.

See MECHANIC'S LIEN, 12, 15, 16; VENDOR AND PURCHASER.

NOTICE BY PUBLICATION.

See JUDGMENT, 1.

NUISANCE.

See NEGLIGENCE, 5.

OBSTRUCTION OF HIGHWAY.

See STREETS AND ALLEYS, 1, 2, 7.

OCCUPYING CLAIMANT.

See REAL ESTATE, ACTION TO RECOVER, 1, 3.

OFFICE AND OFFICER.

1. "*Lucrative Office*."—*What is*.—The office of trustee of the Institute for the Education of the Deaf and Dumb and the office of school trustee are lucrative offices within the meaning of section 9, article 2, of the Constitution.

Chambers v. State, ex rel., 365

2. *Same*.—*Office of School Trustee*.—*Vacation of*.—The acceptance, therefore, of the former office by an incumbent of the latter vacates the latter. *Ib.*

3. *Same*.—*Forfeiture*.—*Information*.—*Necessary Averments*.—In an action to oust such incumbent from the office vacated, the information is sufficient if it states such facts as show a forfeiture of the office. *Section 1131, R. S. 1881.* *Ib.*

PARENT AND CHILD.

See CRIMINAL LAW, 26; DAMAGES.

PARTIES.

See WILL, 1.

PARTITION.

See ADVANCEMENT, 2; DESCENT, 2.

1. *Action by Assignee in Insolvency*.—*Recording of Deed of Assignment*.—*Sufficiency of Allegation as to*.—In an action for partition by the assignee of an insolvent debtor, an allegation in the complaint that the deed of assignment was *duly* filed and recorded in the recorder's office of the county in which the assignor resided and in which the real estate is situated, shows a compliance with the requirement of section 2663, R. S. 1881, that the deed shall be filed with the recorder of the county in which the assignor resides within ten days after its execution, and be recorded as other deeds. *Jewett v. Perrette*, 97

2. *Same.*—*Deed of Assignment.*—*Exhibit.*—The deed of assignment is not the foundation of such action, and the assignee is not required to file a copy of the instrument with the complaint as an exhibit. *Ib.*
3. *Same.*—*Action for.*—*Leave of Court.*—An assignee in insolvency can not maintain an action for partition as a matter of course. Unless he makes it appear that it will be to the interest of his trust to bring the action, and that he is acting under the direction of the court, his action will fail. *Ib.*
4. *Collateral Attack.*—A partition sale after it is confirmed can not be collaterally attacked on the ground that the commissioner, who was the attorney of the complaining party, entered into a conspiracy to defraud the plaintiff of his right in the land sold. An independent action to set the sale and transfer aside does not lie. *McLead v. Applegate, 349*
5. *Title in Issue.*—*New Trial as of Right.*—Where title is put in issue, in a partition proceeding, and there is an adjudication upon it, a new trial as of right is demandable. *Powers v. Nesbit, 497*
6. *Interlocutory Order.*—*Advancement.*—Where partition is ordered the court can do no more than fix the amount to be charged against a co-tenant as an advancement, and the commissioners make the proper apportionment of the land between the tenants, deducting from the share of a tenant the amount advanced to him. *Scott v. Harris, 520*
7. *Same.*—*Rule for Commissioners.*—The commissioners, in making partition, must apportion and set apart to each tenant, by metes and bounds, the portion in value to which he is entitled; and if there be advancements to be taken into consideration, they ascertain the value of the land to be partitioned, together with the advancements to the tenants, and apportion to each tenant his share of the real estate. If, by reason of an advancement, a tenant is not entitled to a part of the real estate, then they apportion it between the other tenants. Their acts are not judicial, but mere computations based on the judgment of partition defining the share of each tenant. *Ib.*

PASSENGER.

See **COMMON CARRIER, 2.**

PAWNBROKERS.

See **CONSTITUTIONAL LAW, 1.**

PAYMENT.

See **SUB-CONTRACTOR, 2.**

1. *Plea of.*—*Proof.*—Proof that an attorney retained out of money collected on a judgment recovered for his client a sum sufficient to satisfy his lien for fees, will sustain a plea that the note given by the client to the attorney for such fees was paid. *Braden v. Lemmon, 9*
2. *Same.*—*Verdict.*—*Variance.*—A finding that other attorneys had an interest in the note in suit will not be disregarded as in conflict with the note, the court having found that it was agreed between the client and his attorneys that payment should be made to the payee of the note. *Ib.*
3. *Same.*—*Question of Fact.*—Payment is a question of fact, and where the fact of payment of a note, the ultimate fact in issue between the parties to the suit, is stated as a conclusion of law and not as a statement of fact, the finding can not be aided by the conclusion of law, and a new trial should be granted. *Ib.*
4. *Plea of.*—*Evidence.*—For evidence held sufficient to support a plea of payment by the State for services rendered by plaintiff's firm of attorneys, see opinion. *Jacobs v. State, 77*

5. *Place of can not be Changed by Debtor.*—A debtor can not change the place where he has agreed to pay off his obligation. *Carr v. State, ex re*, 204

PERSONAL INJURIES.

See BRIDGE; MUNICIPAL CORPORATION, 8, 11; NEGLIGENCE, 1.

PLEADING.

See CONTRACT, 2; DEED, 2, 3; EASEMENT, 7, 10; FRAUDULENT CONVEY-
ANCE, 2; INJUNCTION, 1; LANDLORD AND TENANT, 4; LIFE INSUR-
ANCE, 5; MUNICIPAL CORPORATION, 13, 14; NEGLIGENCE, 4; RE-
CEIVER, 1; SLANDER; STREETS AND ALLEYS, 7; WILL, 3, 4.

1. *Partial Defence.*—*Demurrer.*—A pleading which purports to answer the whole complaint, and the matters therein pleaded, amounting to a partial defence only, is bad on demurrer. *Roberts v. Abbott*, 83
2. *Plea in Abatement.*—*Order of Filing.*—A plea in abatement, filed after a plea in bar, will be stricken out on motion, even though the plea in bar was withdrawn, by leave of court, for the purpose of filing such plea in abatement, before the latter was filed. *Watts v. Sweeney*, 116
3. *Same.*—*Dismissal of Complaint.*—A dismissal of the action by the plaintiff after a cross-complaint filed by the defendant does not operate as a dismissal of the cross-complaint. *Ib.*
4. *General Denial.*—*Demurrer.*—*Harmless Error.*—When the general denial is pleaded no available error is committed by sustaining a demurrer to another answer which sets up such facts only as are admissible in evidence under the general denial. *Harding v. Cowgar*, 245
5. *Same.*—*Partial Defence.*—A pleading purporting to answer the whole complaint, and the matters therein pleaded, amounting to a partial defence only, is bad on demurrer. *Ib.*
6. *Complaint.*—*Sufficiency of.*—See opinion for a complaint sufficient to show fraud in a commissioner's sale of land. *McLead v. Applegate*, 349
7. *Reply.*—*Demurrer.*—*Practice.*—A reply, pleaded with the general denial, which sets up only such facts as are admissible under the general denial, is demurrable, and the subsequent withdrawal of the general denial will not render the ruling sustaining the demurrer available error. *Cincinnati, etc., R. W. Co. v. Smith*, 461
8. *Sufficiency of.*—*Estoppel to Contest.*—*Arrest of Judgment.*—An agreement entered of record, and trial had thereunder by the court, that no answers to a complaint and cross-complaint need be filed, but all matters of defence, set-off, counter-claim and reply may be given in evidence without further pleading, followed by a decree thereon, cuts off a motion in arrest of judgment, and precludes any question being raised concerning the sufficiency of the pleading, except the question of jurisdiction of the subject-matter. *Farmers, etc., Co. v. Canada, etc., R. W. Co.*, 250
9. *Same.*—*Issue, Waiver of.*—A voluntary submission of a cause for trial is a waiver of a failure to file pleadings forming an issue, even in the absence of an express agreement to that effect. *Ib.*
10. *Answer.*—*General Denial.*—When the general denial is pleaded no error is committed by sustaining a demurrer to an answer which sets up only such facts as are admissible in evidence under the general denial. *Craig v. Frazier*, 286
11. *Action on Bond.*—*Breach of Warranty.*—*Cross-Complaint*—In an action on the bond of an insurance agent, a cross complaint, based on a breach of contract, which alleges that the company sold to the agent renewals warranted to be worth a certain sum; that they were afterwards ascertained to be worth a much less sum, whereupon the contract was cancelled and the notes given in consideration for the

renewals surrendered, does not state a cause of action, as the complainant is not shown to have been injured by the breach of the warranty.

Kempshall v. East, 320

12. *Same.*—*Answer.*—*Release of Bond.*—An answer by the sureties on such bond alleging that the obligee agreed to cancel the bond on the compliance by the principal with certain stipulations, without alleging a compliance or an offer of compliance, is bad. *Ib.*

POLICE POWER.

See CONSTITUTIONAL LAW, 1.

POSSESSION.

See VENDOR AND PURCHASER.

PRACTICE.

See ARREST OF JUDGMENT; BILL OF EXCEPTIONS; FRAUDULENT CONVEYANCE, 7; INSTRUCTIONS TO JURY, 2; SUPREME COURT, 3, 4.

1. *Motion to Strike out Pleading.*—*Harmless Error.*—Overruling a motion to strike out parts of a pleading is not available error. *Walker v. Larkin*, 100
2. *Same.*—*Contract.*—*Parol.*—*Presumption.*—A contract not alleged to be in writing is conclusively presumed to rest in parol; and available error can not be predicated on the overruling of a motion to make a complaint on contract more specific by alleging whether the contract was in writing or by parol. *Ib.*
3. *Instructions.*—*Exceptions to Parts.*—Where instructions, taken as a whole, state the law of the case correctly, error in a single instruction, or a clause of an instruction, will not be available for a reversal of the judgment. *Craig v. Frazier*, 286
4. *Cross-Errors.*—*Amount of Recovery.*—*Question of, How Presented.*—Where a plaintiff desires to present a question as to the amount of recovery, the correct practice is to move for a new trial, and assign the proper cause in the motion. *Merritt v. Richey*, 400
5. *Motions in Arrest of Judgment and for a Venire de Novo.*—*When Must be Made.*—A motion in arrest of judgment and a motion for a *venire de novo* must precede the rendition of the judgment, and can not be considered if not made until after judgment has been rendered. *Potter v. McCormack*, 439
6. *Same.*—*Defective Verdict.*—A motion in arrest of judgment will not reach a defective verdict. *Ib.*
7. *Objections to Question.*—Only objections raised in the trial court to a question put to a witness will be considered in the Supreme Court; and other grounds for the exclusion of such a question will not there be available. *Louisville, etc., R. W. Co. v. Rush*, 545
8. *Bill of Exceptions.*—*Long-Hand Manuscript.*—The record recited that ninety days were given in which to file a bill of exceptions, after the re-ital of a prayer for an appeal. Following this was an entry in the transcript that the following bill of exceptions was filed in the clerk's office, in the cause, to wit: "Exhibits A, B, C, D, E, F and G, the same being the evidence introduced upon the trial of the cause." Attached to the transcript, immediately after what purported to be the formal commencement of a bill of exceptions, reciting that the following evidence was introduced, was what appeared to be a portion of the evidence, marked "Exhibit A." With the record, in addition to "Exhibit A," were five disconnected volumes of evidence marked B, C, D, E and F, with a certificate of a stenographer at the close of "Exhibit F" that it is a *verbatim* report of evidence given in the cause, the title of the case being given, and the certificate being duly signed. None of the volumes purporting to contain the evi-

dence were authenticated by the signature of the judge, or otherwise identified, except by the two file marks of the clerk of the circuit court. In that part of the transcript marked "Exhibit N," was a certificate, but unsigned, to the effect that the long-hand manuscript of the stenographer contained all the evidence given in the cause. *Held*, that the evidence was not in the record. *Stevens v. Stevens*, 559

9. *Same.*—*Test.*—The long-hand manuscript of the evidence found with the papers on an appeal must be so incorporated in and identified by a bill of exceptions that if a dispute arises whether what purported to be the evidence is in fact it, the court can settle the dispute by the record alone. *Ib.*
10. *Same.*—*Instructions.*—*Absence of Evidence.*—If the evidence is not in the record, the case will not be reversed on account of an instruction, if, upon any state of the evidence which might have been properly before the jury, the instruction would have been correct. It is sufficient if it is relevant to the issue. *Ib.*

PREFERENCE OF CREDITORS.

See **FRAUDULENT CONVEYANCE**, 1, 4, 5.

PREFERRED CLAIM.

See **MECHANIC'S LIEN**, 10 to 12; **PROBATE PRACTICE**, 5 to 7.

PRESCRIPTION.

See **EASEMENT**, 3, 8.

PRESUMPTION.

See **ADVANCEMENT**, 1; **APPEAL**, 1; **CRIMINAL LAW**, 18, 22; **JURISDICTION**; **LIFE INSURANCE**, 5.

PRINCIPAL AND SURETY.

See **MARRIED WOMAN**.

PRIORITY OF LIENS.

See **LIENS**, 1, 2, 4; **MECHANIC'S LIEN**, 4, 5; **TAXES**, 4.

PROBATE PRACTICE.

1. *Demurrer.*—*Motion to Strike Out.*—A petition for the allowance of a claim as preferred, or exceptions filed to an administrator's report, may be tested by a demurrer or by a motion to strike out. *Goodbub v. Estate of Hornung*, 181
2. *Same.*—*Sufficiency of Petition.*—*Court May Pass upon of its Own Motion.*—The court, of its own motion, may pass upon or determine the sufficiency of a petition to allow a claim or of exceptions to a report without any demurrer or motion being filed, and exceptions taken to such action of the court presents the question for review. *Ib.*
3. *Same.*—*Code of Civil Procedure.*—Whenever applicable the rule of procedure in civil causes should be applied in probate causes. *Ib.*
4. *Same.*—*Examination of Report.*—*Formality.*—In most matters relating to the filing, examination and approval or disapproval of reports in probate matters, strict formality is not required; substance rather than form should be considered. *Ib.*
5. *Same.*—*Preferred Claim.*—The question as to whether or not a claim should be paid as preferred can be raised at the time of the consideration of the final report, either by a petition or by exceptions. *Ib.*
6. *Same.*—*Trial of Preferred Claims.*—A separate trial, to determine the right to have a claim preferred, can not be demanded; the right to a preference must be tried and determined in connection with the trial of the question as to the allowance of the claim. *Ib.*

7. *Same.—Order of Priority.—Changing.—When Determined.*—The court can not change the order of priority of claims fixed by the statute. They may be allowed without inquiry as to the sufficiency of assets to pay them, and their priority determined afterwards. *Ib.*
8. *Same.—Question Presented by Record.*—The filing of a petition to have a claim preferred, the court's overruling and refusing to grant the prayer thereof, and incorporating such petition and reciting the action of the court thereon in a bill of exceptions, do not show that the court overruled the petition and declined to allow the claim as preferred, upon the ground that the evidence did not show it to be a preferred claim; only the sufficiency of the petition in such an instance can be considered on appeal. *Ib.*

PROMISSORY NOTE.

Consideration.—Execution and Payment of Bail-Bond.—The defendant's son, on a plea of guilty to petit larceny, was fined in a certain sum and committed to jail in default of payment. The defendant and his son paid a part of the judgment, and to secure a stay of execution on the remainder executed a replevin bond. The plaintiff, at the request of the defendant, also signed the bond, and the defendant executed his note as collateral security. The son was not in jail when the bond was signed, but had been released two days before. After the expiration of the stay the plaintiff paid the judgment and instituted an action on the note.

Held, that the fact that the son had been released from jail when the plaintiff signed the bond was no defence to the action, and that execution of the bond and the payment constituted a good consideration for the note. *Davis v. Meisner*, 343

PROSTITUTION.

See CRIMINAL LAW, 15, 16.

QUIETING TITLE.

See MECHANIC'S LIEN, 7.

Decree Establishing Boundary Line.—In a suit to quiet title where the complaint describes the land, alleges that the defendant is claiming an interest in it, and asks for judgment, and a decree is rendered quieting title and establishing the line between the parties to the suit, such decree is binding upon all the parties and those claiming title through them. *Satterwhite v. Sherley*, 59

RAILROAD.

See JUDGMENT, 3; VENDOR AND PURCHASER.

1. *Injuries to Travellers at Public Crossing.—Failure to Give Statutory Signals.—Contributory Negligence.*—Where those in charge of a train approach a railroad crossing without giving the statutory signals, they are guilty of such negligence as renders the company liable to one who, without concurring negligence, is injured while attempting to cross the track. *Baltimore, etc., R. R. Co. v. Walborn*, 142
2. *Same.—Negligence.—When Question of Law and when of Fact.*—Where the facts are undisputed, and where but one inference can be drawn from the undisputed facts, the question of negligence is one of law; but where more than one inference may be reasonably drawn from the facts, the question is one of fact for the jury, under proper instructions from the court. For a state of facts where more than one inference might be drawn, and where, therefore, the question of negligence was one of fact for the jury, see opinion. *Ib.*
3. *Tracks Laid in Street.—Double Tracks.—"Line of Railroad."*—A city granted a right of way to a railroad company to lay its track in a street, upon condition that it grade and gravel such street, and make

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and maintain all necessary culverts and crossings, the grade to be established so as not to materially interfere with the convenience of the public in crossing the track where other streets intersected such street. Another condition was that the "line of the railroad" should "be located so as not to approach the sidewalk curbstone nearer than fifteen feet." The company also prosecuted proceedings of appropriation, and had the damages sustained by all the adjacent land-owners assessed. The use to be made of the property was in no way limited.

Held, that the company had a right to lay one or more tracks in the street; that the words, "line of the railroad," as used in the ordinance, had reference to the outer rail of the track, and so long as there was a clear fifteen feet between such outer rail and the curbstone, and the track was not raised above the established grade of the street, an abutting land-owner could not object.

Chicago, etc., R. R. Co. v. Eisert, 156

4. **Mechanic's Lien.—Filing Notice.—Extent of Lien.**—In order to obtain a lien upon a railroad, a laborer or material man is only required to file notice in the recorder's office in the county where he furnished the material or did the work through which such road runs, and then such lien extends to the entire line of the road in this State. In case of a sale of the road and a transfer of the lien to the fund derived by the sale by the order of the court ordering the sale, the lien is transferred to the whole fund and not to a part.

Farmers, etc., Co., v. Canada, etc., R. W. Co., 250

5. **Same.—Foreclosure and Sale of Railroad.**—A mechanic's lien on a railroad, although notice is filed only in one county, must be foreclosed against the whole line of road situate within the State, and the whole of that part of the road sold; a part of such part can not be sold. *Ib.*

6. **Same.—Extends to the Entire Article Repaired.—Sale.**—A mechanic's lien for repairing an article extends to the entire article; and the whole of such article must be sold in order to enforce the lien. *Ib.*

7. **Same.—Subsequent Mortgagor of Railroad.**—A lien acquired by filing notice in one county extends to the entire road within the State, and a subsequent mortgagee of the entire road takes his mortgage subject to such lien. *Ib.*

8. **Same.—Mortgage.—Priority of Lien.—Bona Fide Holder.**—A mortgage of a railroad yet to be built to secure bonds issued to raise money for the construction of said railroad, is junior to a mechanic's lien acquired in furnishing material for or performing labor upon such railroad, unless it is affirmatively shown that the holders of such bonds paid value for them before notice of such liens. *Ib.*

9. **Same.—Contractor can not Defeat Priority of Mechanics' Liens.**—A principal contractor can not defeat the liens of those whose debtor he is for work and materials, by asserting the lien of a mortgage executed by the owner by whom he was employed to build a house or a railroad. He can not defeat their liens by asserting a lien superior to them, no matter how he may acquire such superior lien. *Ib.*

10. **Same.—Railroad.—Priority of Mortgage Executed to Secure Bonds Sold After Work Performed or Materials Furnished.**—A railway company entered into a contract with a construction company to build and equip its road. The president of the railway company was the general manager of the construction company. Three months afterward the railway company executed in duplicate a trust deed of its road securing four hundred and forty bonds. One of these duplicates was delivered by its president, more than two months after its execution, to a loan company, and the other retained by the railway company. The railway company also retained the bonds secured when it delivered the trust deed, but, from time to time, delivered them to the

general manager of the construction company upon estimates issued to him by the engineers of the railway company. Ten of these bonds were transferred to D. and sixty-six to F., a sub-contractor. The remainder of the bonds, three hundred and sixty-four, were hypothesized by the construction company, but when, where, to, or for how much, was not shown. Material men and mechanics, working for the construction company, filed notices, after the date and delivery of the trust deed, of an intention to claim liens for materials furnished and labor performed in the construction of such railroad.

Held, that the liens of such material men and laborers were superior to all the holders of said bonds secured by such trust deed. *Ib.*

REAL ESTATE.

1. *Title.—Sheriff's Sale.—Relation Back to Date of Judgment.*—The title of a purchaser of land at a sheriff's sale relates back to the time the judgment became a lien on the land sold, and all the right and interest possessed by the judgment debtor at the date such judgment became a lien vest in the purchaser. *Paxton v. Sterne*, 289
2. *Same.—Color of Title.*—A sale on a school fund mortgage, though void, gives a color of title to the purchaser. *Ib.*
3. *Purchaser at Sheriff's Sale.—Title.—Relation Back to Rendition of Judgment.*—The title of the purchaser of land at a sheriff's sale relates back to the rendition of the judgment on which the sale is made. *Merritt v. Richey*, 400
4. *Same.—Wrongful Possession.—Damages.*—After the expiration of the year for redemption the purchaser at the sheriff's sale is entitled to a judgment for possession, and for damages to the amount of the rental value against a purchaser from the judgment debtor, subsequent to the rendition of the judgment, who wrongfully continues in possession after the expiration of the year for redemption. *Ib.*
5. *Same.—Loss by Fire.—Liability of Occupant.*—The purchaser from the judgment debtor does not become a mere trespasser by remaining in possession, since his entry into possession was rightful, and he is not liable for the loss of the building by fire, the result of an accident, during his occupancy of the property. *Ib.*

REAL ESTATE, ACTION TO RECOVER.

1. *Color of Title.—Occupying Claimants.—Purchaser at Foreclosure Sale.*—A sale of land under a decree of foreclosure is sufficient to give the purchaser and those claiming under him color of title as against all the world; and such purchaser, and those claiming under him, are entitled to the benefit, in a proper case, of the occupying claimant law. *Goodell v. Starr*, 198
2. *Same.—Owner of Fee not Made a Party.—Effect.—Subsequent Foreclosure Against Grantee.*—A foreclosure against the mortgagor after he has conveyed the land is void as to his grantee, unless such grantee is made a party to such proceedings, and joining him in the complaint, but not serving him with process, and not taking judgment against him, until after decree of foreclosure and sale of the land as against the mortgagor, will not deprive him of title to the land mortgaged, nor render the former foreclosure proceedings, as to him, valid. *Ib.*
3. *Same.—Occupying Claimant.—Possession of Land.*—A grantee of mortgaged lands, although he has not paid off the mortgage, is entitled to the possession of the premises conveyed to him, even after foreclosure and sale as against the mortgagor; but in an action to obtain such possession, the purchaser at the foreclosure sale, who has obtained possession by virtue of such sale, may maintain a cross-

complaint to have the mortgage foreclosed as against the grantee; and such mortgage may be foreclosed, and the land, if the decree is not satisfied within a time designated, may be ordered sold without relief from valuation or appraisement laws; and such grantee can not claim the possession until he has paid off the decree. Section 1085, R. S. 1881. *Ib.*

REAL ESTATE AGENT.

See **FACTORS AND BROKERS.**

RECEIVER.

1. *Action by Against Tenant Wrongfully Holding Over.*—*Leave of Court.*—*Pleading.*—*Complaint.*—Where one holding under a receiver as lessee or tenant refuses to surrender, the receiver is entitled to maintain an action to recover possession in his own name without an order of court, and the complaint need not allege that the receiver has been authorized by the court to bring the action. *Poulder v. Catterson*, 434
2. *Same.*—*Title.*—*Estopel.*—One who has taken a lease from and become the tenant of a receiver, is estopped to deny the title of his lessor while he remains in possession under the lease. *Ib.*

RECORDING.

See **CHATTTEL MORTGAGE**, 4; **PARTITION**, 1.

REFORMATION OF INSTRUMENT.

See **MORTGAGE**, 2.

REHEARING.

See **SUPREME COURT**, 4.

REMEDIES.

See **CONSTITUTIONAL LAW**, 3, 4; **CRIMINAL LAW**, 2; **REPUDIATION**, 2.

RENTS AND PROFITS.

See **TENANTS IN COMMON**.

REPAIR OF DRAINS.

See **DRAINAGE**, 1.

REPEAL OF STATUTE.

See **CRIMINAL LAW**, 3; **MECHANIC'S LIEN**, 8; **STATUTE**, 1.

REPUDIATION.

1. *Presumption.*—A State has no right to repudiate its valid obligations, neither directly nor by indirection; and no such a purpose will be imputed to it by the court unless a contrary intention is clearly manifested. In ascertaining whether or not a State intended to repudiate a valid claim the whole course of legislation upon the subject will be examined by the courts. *Carr v. State, ex rel.*, 204
2. *Same.*—*Change of Remedy.*—A State has the power to withdraw a remedy, and thus defeat its creditor. *Ib.*

ROBBERY.

See **CRIMINAL LAW**, 13.

RULE IN SHELLEY'S CASE.

See **DEED**, 1; **WILL**, 11.

SALE.

See **CHATTTEL MORTGAGE**, 1; **EXECUTION**, 1; **JUDGMENT**, 10; **TAXES**, 2.

SCHOOL SUPPLIES.

See **SCHOOLS AND SCHOOL DISTRICTS**, 1, 2.

SCHOOLS AND SCHOOL DISTRICTS.

1. *Township Trustee.*—*School Supplies.*—*Note.*—*When Township Bound.*—A note, or other obligation, executed by the township trustee for school supplies purchased on credit does not bind the school corporation; it is bound only where the school supplies were actually delivered to the school township. *Litten v. Wright School Tp.*, 81
2. *Same.*—*Value of Supplies.*—*Evidence.*—The notes or certificates issued by a township trustee do not preclude the school township from proving the actual or true value of the property purchased by the trustee. Evidence of the value of the property alleged to have been sold to the school township is properly admissible. *Ib.*
3. *Contract.*—*Employment of Teacher.*—A verbal contract entered into March 31st, 1888, by a teacher with the school trustee, wherein the teacher undertook to teach the school for the term to be held in the school year 1888, for which the trustee promised to pay her "good wages," is not such a contract as will bind the school township and make it liable for a breach. *Fairplay School Tp. v. O'Neal*, 95
4. *Suspension of Pupil.*—*Mandamus.*—*Contempt of.*—In an action to compel a city school superintendent by mandamus to re-admit to school the relator's son alleged to have been wrongfully suspended, the answer alleged that the boy had been suspended for a violation of a rule, which was set out. A demurrer to the answer was overruled, and a reply of general denial was then filed. The trial resulted in a finding for the relator and a peremptory writ issued. Immediately thereafter the boy was re-admitted to school, but for a violation of the same rule for which he had been first suspended he was again suspended.

Held, that the court by overruling the demurrer to the answer adjudged that the rule was reasonable, and hence the defendant was not in contempt in suspending the pupil a second time. *Bowers v. State, ex rel.*, 272

SHERIFF'S SALE.

See REAL ESTATE, 3, 4; SUBROGATION, 1.

SIGNALS.

See RAILROAD, 1.

SINKING FUND.

Acts of 1846, 1847 and 1872.—*Interest.*—*Failure to Demand when Bonds were Due.*—State bonds were issued in 1852 under the acts of 1846 (Acts 1846, p. 1), 1847 (Acts 1847, p. 3), authorizing the funding of the State debt, payable in the city of New York. The act of 1846 created a sinking fund for the payment of the State's indebtedness. By an act of 1872 (Acts 1872, p. 27), the sinking fund was merged in the general fund of the State, and the State agency in the city of New York, and the sinking fund commissioners, established by the act of 1846, were abolished. Previous to 1872 such commissioners had stopped the payment of interest, and had declared that no interest would be paid on the bonds issued by authority of the acts of 1846 and 1847, because of the fact that none had been demanded for several years. Before stopping the payment of interest the commissioners had published a notice of their intention to do so, as to all bonds not presented in New York at the agency by a certain named date. This action of the commissioners was ratified by the act of 1872, and the bonds and interest declared payable at the office of the State treasury. In 1865 (Acts 1865, p. 48) an appropriation was made to pay off all of the State's

indebtedness. The bonds in suit were not presented for payment, nor was payment demanded, until about 1890.
Held, that the action of the sinking fund commissioners in stopping payment of interest was unauthorized; that that part of the act of 1872 ratifying such action was unconstitutional, and that such bonds drew interest until actually paid at the rate specified in the bonds. Compound interest was denied. *Carr v. State, ex rel.*, 204

SLANDER.

Pleading.—**Answer.**—In an action for slander in charging the plaintiff with adultery with one man, an answer which alleges that she was guilty of adultery with another man, is bad. *Buckner v. Spaulding*, 229

SPECIAL FINDING.

See FRAUD, 1.

SPECIAL SESSION.

See COUNTY COMMISSIONERS, 1 to 3.

STATE.

See INTEREST.

1. **Contract of.**—In entering into a contract a State lays aside its attributes as a sovereign and binds itself substantially as one of its citizens does when he enters into a contract. By the act of entering into a contract it abrogates the power to annul or impair it. *Carr v. State, ex rel.*, 204

2. **Action Against.**—**Failure to Make Appropriation.**—**Mandate.**—A State can not be sued, nor can an action for mandate to compel the payment of a valid claim of a State be maintained against its officers, unless an appropriation has been made by the Legislature for the payment of such claim; but a proceeding for a mandate may be maintained against the auditor of state, if a proper appropriation has been made, to compel him to draw a warrant for the amount due. *Ib.*

STATE BONDS.

See INTEREST, 2.

STATE DEBT.

See SINKING FUND.

STATUTE.

See CONTINUANCE; COSTS; CRIMINAL LAW, 1, 2, 15, 19, 25; DECEDENTS' ESTATES, 3; DESCENT, 1, 5; LABOR; MECHANIC'S LIEN, 1, 2, 6, 10, 12; OFFICE AND OFFICER, 3; PARTITION, 1; SINKING FUND; SUNDAY LAW; STREETS AND ALLEYS, 3; WITNESS, 1.

1. **Repeal of.**—**Repealing Act Unconstitutional.**—A repeal of a statute can not be accomplished by an unconstitutional statute; and if an act repealing a former act is invalid, an appropriation made by such former act is not affected by such invalid act, and remains in force. *Carr v. State, ex rel.*, 204

2. **Same.**—**Effect upon Appropriation.**—A State can not invalidate its contract after it is made by repealing the statute authorizing its creation; and an attempt to annul such a contract does not affect an appropriation made in the statute authorizing the assumption of the obligation. *Ib.*

3. **Construction.**—**Particular Description Followed by a General One.**—If words of a particular description in a statute are followed by general words that are not so specific and limited, unless there be a clear manifestation of a contrary purpose, the general words are to be construed

as applicable to persons or things, or cases, of like kind to those designated by the particular words. *Nichols v. State*, 406

STATUTE CONSTRUED.

See CRIMINAL LAW, 2, 25.

STATUTE OF FRAUDS.

1. *Agreements not to be Performed Within One Year.*—Where by the terms of a contract, it is not to be performed within the year, or where it can not be performed within the year, according to the intent and understanding of the parties, as evidenced by its terms, such contract is within the statute, and an action can not be maintained upon it. The statute of frauds has no application to a contract which may or may not be performed within a year. *Durham v. Hiatt*, 514
2. *Same.—Contract.—Construction.*—An oral contract whereby the plaintiff was to trade certain land belonging to the defendant for other lands, and to pay the difference in money to be furnished by the defendant, and whereby, when the trades were made, and title to the lands acquired, they were to become partners, to use the land together, sell the timber and sell the land and divide the profits “after paying back to the defendant what he was out,” is not within the statute of frauds prohibiting the bringing of an action on an oral agreement not to be performed within one year. *Ib.*
3. *Lease. — Part Performance. — Improvements. — Injunction.*— Possession taken under a written lease that does not sufficiently describe the lands leased, and the making of lasting and valuable improvements thereon, are sufficient to take such lease out of the operation of the statute of frauds. If there has been such a part performance of the contract that to refuse a specific performance would work a fraud upon the party seeking it, a court of equity will grant the relief prayed. An injunction also lies, without asking a specific performance, to prohibit the landlord from interfering with the tenant's use of the land. *Weaver v. Shipley*, 526
4. *Same.—Sufficient Location of Property.*—The practical location of the boundaries of the leased premises by the landlord pointing them out, coupled with a subsequent possession of the same by the tenant, by and with the consent of the landlord, is a sufficient location of the property. *Ib.*

STATUTE OF LIMITATIONS.

See CRIMINAL LAW, 14; FRAUDULENT CONVEYANCE, 7.

Life Insurance.—Payment of Premiums.—Repayment out of Proceeds.—Where the insured assigns a policy of life insurance to a creditor to secure his debt, on which the assignee is to pay the premiums, which are to be repaid out of the proceeds of the policy, the fact that he paid such premiums more than six years before the policy matured, or before the commencement of the suit thereon, does not bar his right to apply the money when collected to a repayment of such premiums, the six years' statute of limitations having no application to such a case. *Walker v. Larkin*, 100

STENOGRAPHER'S REPORT.

See CRIMINAL LAW, 6.

STREET IMPROVEMENT.

See STREETS AND ALLEYS, 1 to 6.

STREET RAILWAY.

1. *City may Prescribe Motive Power.—Violation of Grant of Power.—Rival Companies.*—A city, having control over its streets, may prescribe the

motive power to be used in moving cars, and when it prescribes one kind of power the company can not use another; and in a contest between two rival street railway companies for the possession of a street, one of which is using a motive power not authorized by its charter, the other company may attack its right to such street by showing such violation of its franchise.

Indianapolis, etc., R. R. Co. v. Citizens, etc., R. R. Co., 369

2. *Same.*—*Exclusive Possession of Street.*—*Power of City to Grant.*—*First to Occupy Protected.*—A city can not give an exclusive right to a street railway company to occupy all its streets, to the exclusion of all other companies, and so prevent it afterwards giving similar grants to other companies. But if it make such a grant and then make a similar grant to another company, that company which first occupies a street, or which first enters upon the construction of a particular line of street railroads, and has expended its money in the prosecution of the work, is entitled to the possession of such street, or to the streets over which such particular line passes, although the effect is that such company thus acquires the exclusive possession of such street or streets for the purposes of a street railroad. *Ib.*

STREETS AND ALLEYS.

1. *Street.*—*Obstruction of.*—*Injunction.*—A private individual may maintain an action because of an obstruction of a public street, where such obstruction peculiarly affects him, although it does not affect the general public. *Chicago, etc., R. R. Co. v. Eisert, 156*
2. *Same.*—*Injunction.*—*Irreparable Injury.*—If the damages are irreparable, such as affecting the free use of a residence, or an abutting lot, cutting off ingress or egress thereto, and endangering the property, life and health of persons residing thereon, an injunction will be granted to prevent the obstruction. *Ib.*
3. *Street Improvement.*—*Defence to Precept.*—Upon an appeal from a precept, no question of fact can be tried which arose prior to the execution of the contract. Section 3165, R. S. 1881. *Boyd v. Murphy, 174*
4. *Same.*—*Letting Bids.*—The common council has the power to choose between bidders for street work, and when it has done so its decision is final. *Ib.*
5. *Same.*—*Presumption.*—It will be presumed by the courts that the council, in letting a bid, acted in good faith and for the best interests of both the city and the property-holders, and that it exercised its discretionary power wisely. *Ib.*
6. *Same.*—*Bid and Additional Contract.*—After bids are received, the council may let the contract to the highest bidder, upon condition that he perform extra street improvement, work not specified in the improvement ordinance and advertisement for bids, even though such extra work has never been ordered by the council, by any resolution or ordinance; and may assess abutting property according to the rate imposed upon it by such bid. *Ib.*
7. *Obstruction of.*—*Mandamus.*—*Pleading.*—A complaint in an action to compel a city by mandamus to remove an obstruction from an alley placed therein by a railroad company, with the consent of the city, must, in order to be sufficient, make it affirmatively to appear that an unlawful use is made of the alley.

State, ex rel., v. City of New Albany, 221

SUB-CONTRACTOR.

1. *Definition.*—*Mechanics' Liens.*—A sub-contractor is one who takes from the principal contractor a specific part of the work; but neither per-

sons furnishing material, nor laborers on the work, are sub-contractors.
Farmers, etc., Co. v. Canada, etc., R. W. Co., 260

2. *Same.*—*Payment.*—*Tender.*—*Mechanics' Lien.*—A sub-contractor is bound to accept payment as provided in the principal contract; but if a proper tender is not made to him of the article in which he is to be paid, he may maintain an action for a money judgment. Material men and laborers, however, are not bound to accept anything in payment except money, whatever may be the contract between the owner and contractor.
Ib.

SUBROGATION.

See *TAXES*, 3.

1. *Sale on Execution.*—A purchaser at a sheriff's sale acquires by subrogation the rights of the judgment plaintiff or execution creditor in the event that the sale is ineffective to convey title. *Paxton v. Sterne*, 289

2. *Same.*—*Prior Equity.*—In 1859 F., the owner of certain real estate, mortgaged it to the State for the benefit of the school fund. In 1871 F. mortgaged the land to S., and the mortgage was foreclosed, but no sale was made on the decree. One month after such foreclosure the auditor sold the land by virtue of the school fund mortgage, and executed a deed to the purchaser, S. One year previous to such foreclosure six judgments were rendered against S. for a total sum of \$20,000; executions were issued and levied upon the land. One year after the foreclosure the land was sold to L. on one of these executions, and he assigned the certificate of sale to J., and J. took out a sheriff's deed thereon at the expiration of the year of redemption. Eight months after the foreclosure S. executed a mortgage to M., trustee, of which mortgage P. became the owner by assignment. Seven years after such foreclosure F. executed a quitclaim deed to U., who afterwards brought suit to set aside the sale under the school fund mortgage, and succeeded in obtaining a decree allowing him to redeem from it. A redemption was made by him, he paying the money into court.

Held, that J., and not P., was entitled to the money, upon the ground that their equities being equal, the one prior in point of time was entitled to preference.
Ib.

SUMMONS.

Against Township Trustee.—A summons, reading, "You are hereby commanded to summons trustee Cicero school township," etc., sufficiently indicates that the action is against the township, and not against the trustee personally, and the township is bound to take notice of the pendency of the action. *Vogel v. Brown Township*, 112 Ind. 299, distinguished.
Cicero School Tp. v. Chicago Nat'l Bank, 79

SUNDAY LAW.

Subscriptions to Church.—*Work of Charity.*—A subscription made on Sunday, to liquidate an indebtedness of a church contracted in the erection of a building to be used as a place of worship, is not "common labor" within the inhibition of the statute (section 2000, R. S. 1881), but is a work of charity, and is valid and binding. *Catlett v. Trustees*, etc., 62 Ind. 365, overruled.
Bryan v. Watson, 42

SUPREME COURT.

1. *Weight of Evidence.*—Unless there is an absolute failure of evidence on some material point this court will not disturb the verdict of the jury on the weight of the evidence.
McCarty v. State, 283

2. *Request for Instructions.*—*Refusal of.*—Available error can not be predicated on the refusal of a request for instructions where the record

fails to show that the instructions were signed by the party, or his attorney, or that they were presented before the argument began.

Craig v. Frasier, 286

3. *Practice*.—No question is presented on the ruling of the trial court in excluding, in a prosecution for rape, a report made by the grand jury where the report is not embodied in the bill of exceptions.

Williams v. State, 471

4. *Time of Filing Brief*.—*Petition for Rehearing*.—A claim filed against an estate and disallowed, was, on appeal by the claimant, omitted from the transcript, but the appellant's argument proceeded on the assumption that the record was complete. Subsequently, upon *certiorari*, the record was amended.

Held, on the affirmance of the judgment, that a rehearing would not be granted to enable the appellant to file a supplemental brief because of such amendment.

Schricker v. Stiles' Estate, 472

SURPRISE.

See WITNESS, 1.

SUSPENSION OF PUPIL.

See SCHOOLS AND SCHOOL DISTRICTS, 4.

TAXES.

1. *Foreclosure of Tax Lien*.—*Removal of Suit to United States Circuit Court*.—On the removal to the Circuit Court of the United States of a suit to quiet title on a tax deed, or to foreclose a lien, that court has power, in a chancery proceeding, to hear and determine the action, and its finding and decree is final and conclusive, and can not be impeached or questioned in a subsequent action in the Supreme Court of this State.

Abbott v. Union Mut. L. Ins. Co., 70

2. *Same*.—*Sale*.—*Setting Aside of*.—Under a decree of the Circuit Court of the United States foreclosing a tax lien, a sale of the land was made by the special commissioner appointed by the court. On the application of the junior mortgagee the sale was set aside. Thereupon the mortgagee paid into court a certain sum of money, which was accepted by the purchaser at the sale and the complainant in full satisfaction of their claim, and the court entered an order declaring the mortgagee subrogated to all the rights of the complainant in the decree of foreclosure.

Held, that while the payment to the complainant satisfied the decree as to him, it was kept alive as to the mortgagee, and that a subsequent sale, might be made.

Ib.

3. *Same*.—*Subrogation*.—*Prior Mortgagee*.—*Notice*.—The fact that the prior mortgagee had no notice of the application made by the junior mortgagee to be subrogated to the rights of the complainant in the decree, did not render the order of the court void, as the junior mortgagee and the complainant, the only parties interested, were in court.

Ib.

4. *Same*.—*Foreclosure of Tax Lien*.—*Owner of Land not Made Party*.—*Invalidity of Sale*.—In a suit to quiet title on a tax deed against the mortgagees of the land the owner of the land was not made a party. A decree was rendered declaring the tax deed invalid. The lien for taxes due was declared superior to the liens of the mortgagees and foreclosed, and the land was sold.

Held, that the sale was void as to the owner; that while a mortgagee was estopped by the decree to deny that the lien held by the complainant was superior to the liens held by the mortgagees, he was not estopped to assert that the owner held the title to the land when the decree was rendered.

Ib.

TENANTS IN COMMON.

See LANDLORD AND TENANT, 1, 2.

Rents and Profits.—One tenant in common, who occupies the land, is not accountable for rents unless he excludes his co-tenant or receives rent from a third person. *Davis v. Hutton*, 481

TENDER.

See SUB-CONTRACTOR, 2.

TITLE.

See JUDGMENT, 4; PARTITION, 5; REAL ESTATE, 1 to 3; REAL ESTATE, ACTION TO RECOVER, 1; RECEIVER, 2.

TOWNSHIP TRUSTEE.

See SCHOOLS AND SCHOOL DISTRICTS, 1 to 3; SUMMONS.

TRUST AND TRUSTEE.

See FRAUDULENT CONVEYANCE, 1.

1. *Liability to Claimant on Fund.*—A person receiving the proceeds arising from the sale of a leasehold interest, under a promise to pay off any liens on the property, becomes a trustee for all holding such liens, and, upon a proper demand, an action by such a lien-holder may be maintained against him. *Coppage v. Gregg*, 359

2. *Same.*—*Acceptance of Trustee's Promise by Creditor.—Demand.—What Sufficient to Constitute.*—In a complaint against such trustee by the lien-holder, it is necessary to show an acceptance by such creditor of the trustee's promise; but such acceptance is implied from the fact of bringing the action; and an acceptance and demand may be inferred from an allegation that such trustee refused to pay the plaintiff, and appropriated the money to his own use. *Ib.*

3. *Guardian Purchasing Land with Ward's Money.*—A guardian who purchases and improves a lot or tract of land with his ward's money, taking the title in his own name, creates a resulting or constructive trust in the lot or tract in favor of the ward. *Ray v. Ferrell*, 570

4. *Same.*—While the legal title remains in the guardian, one who, in good faith, buys and acquires a title from him, or takes a mortgage from him on such property, without any notice of the ward's equity, acquires rights therein superior to those of the ward. *Ib.*

VACATION OF HIGHWAY.

See HIGHWAY.

VENDOR AND PURCHASER.

Possession.—*Notice.*—Where the owner of a farm conveys to a railroad company a strip of land eighty feet wide for a right of way and the company takes possession of forty feet only and fences the same in and constructs its road thereon, leaving the remaining forty feet in the possession of the owner, who continues to use it as a part of his farm, the conveyance not having been recorded, the railroad company's possession of the part occupied and used is not constructive notice to a subsequent purchaser of the farm of the extent of the railroad company's purchase. Nor is a recital of the deed to such purchaser to the effect that his conveyance is subject to the right of way of the railroad company notice to him that such right of way is of greater extent than the way actually occupied.

Cincinnati, etc., R. W. Co. v. Smith, 461

VENIRE DE NOVO.

See PRACTICE, 5.

VERDICT.

See COUNTY COMMISSIONERS, 4; CRIMINAL LAW, 26; PAYMENT, 2.

1. *Answers to Interrogatories.*—The general verdict will stand, unless the antagonism between it and the special answers to interrogatories is so clear and strong as to preclude a reconciliation.

Rogers v. Leyden, 50

2. *Special.—Overpayments.—Action for Accounting.—Demand.*—The plaintiff, as appears by the special verdict, executed to the defendant a promissory note for one hundred and twenty dollars, and as collateral security gave him an order upon his employer. Payments were made on the note at various times, and the entire sum due upon it was paid before October 18th, 1887. On that day the appellant received upon one of the orders delivered to him as collateral security the sum of \$60.90. The verdict recites: "About the time the defendant received * * * said \$60.90 on the order the plaintiff demanded an accounting from the defendant, and at the same time demanded that the defendant surrender to him the note, and that the defendant pay to plaintiff the balance of the sum overpaid on the note, both of which demands the defendant refused, and retained, and yet retains, possession of the note and the money so last collected."

Held, that plaintiff was entitled to judgment; that it appears that a sufficient demand was made, and that it was made after the collection of the order paid on October 18th, 1887. *Woodward v. Davis*, 178

WAIVER.

See CHATTEL MORTGAGE, 3; PLEADING, 9.

WARRANTY.

See DESCENT, 3, 4.

WAYS.

See EASEMENT, 3, 4, 6, 7 to 9.

WIDOW.

See DECEDENTS' ESTATES, 3; DESCENT, 1, 5, 7; WILL, 10; WITNESS, 2.

WILL.

1. *Contest of.—Purchasers from Devisee.—Parties.*—In an action to set aside a will admitted to probate, and to establish and probate a lost will, purchasers of land from the devisee under the probated will are proper parties defendant.

Roberts v. Abbott, 83

2. *Same.—Prosecution of Claim against Estate.—Estoppel.*—The fact that the plaintiff, with knowledge of the execution of the will, which disinherited her, prosecuted a claim to final judgment against the administratrix, with the will annexed, for services rendered to the testator, and for property converted by him, did not estop the plaintiff to deny the validity of the will.

Ib.

3. *Same.—Pleading.—Answer Alleging Final Settlement.*—To a suit to contest a will, an answer alleging a final settlement and an order of the court discharging the administratrix with the will annexed, presents no defence where the estate consists of both personal and real property.

Ib.

4. *Same.—Pleading.—Striking out Allegations.*—In a suit to contest a will allegations in the complaint relating to an agreement by the terms of which it is alleged the testator agreed with his brother to make a will bequeathing all his property to the plaintiff may properly be stricken out.

Ib.

5. *Construction in Doubt.—Descent Given by Statute Preferred.*—If the intent

of the testator is doubtful, and two constructions are applicable thereto, that construction will be adopted which casts the property where the law would cast it if no will had been executed.

Kilgore v. Kilgore, 876

6. *Same.*—*Intent as to Particular Clause.*—*Entire Will Examined.*—In the construction of a clause of a will the court will look to the whole instrument, if, by so doing, any light will be thrown upon the particular clause in dispute or to be construed. *Ib.*
7. *Same.*—*Construction.*—*Paramount Object.*—The paramount object in construing a will is to construe it so as to express the true intention and meaning of the testator. *Ib.*
8. *Same.*—*Per Stirpes.*—*Per Capita.*—A will provided that after the death or marriage of the testator's wife, one-fourth part of his property should be "held" by his son, O., "during his natural life, and in case he should die leaving no child or children of his own, then said property to go to any surviving child or grandchildren, in equal parts."

Held, that such fourth part was vested in O. for and during his natural life; one-third of the remainder, real and personal, in K., the surviving son of the testator, O. dying childless; one-third in his two grandchildren, who were children of a deceased son of the testator, and the remaining third in another set of grandchildren, children of another deceased child of said testator; such grandchildren inheriting *per stirpes* and not *per capita*. *Ib.*

9. *Same.*—*Property in Trust.*—*Remainder.*—A second clause provided that the testator's son, D., shall "have and hold" one-fourth of the testator's property "in trust (for his children now born, or which may hereafter be born), during his natural life," "with the right to use any income or rents of said property to aid in raising and educating said children," without bond, "but for any waste or abuse of trust [to] be removed, and another appointed by the court."

Held, that D. held and enjoyed this fourth part in trust for his children, born and to be born, for his natural life, subject to the trust and duty upon his part to appropriate so much of the rents, profits and income as was necessary for the purpose of raising and educating his children; that the remainder, in fee simple and absolutely, vested in D.'s children, then in being, subject to open and let in any other children born thereafter to him; and that D. was not required to give bond, but might be removed for waste or breach of trust. *Ib.*

10. *Widow.*—*Election.*—*Rights Under the Law.*—*When not Waived.*—Where a testator, by his will, makes a specific provision for his widow, but does not declare that such provision is to be in lieu of that made by the law, the widow's right to the five hundred dollars allowed her by law is not waived by her acceptance of the provisions of the will, unless the assertion by the widow of the right to take both under the law and under the will would defeat the purpose of the testator as shown by the disposition which he has made of the residue of his property. *Shipman v. Keys, 353*

11. *Same.*—A general deposition of all the residue of the testator's property by residuary devise, or bequest, not purporting to be in lieu of the widow's absolute claim, is not enough to compel her to elect between the provision made for her by the will and her absolute claim, and she is entitled to both. *Ib.*

12. *Life-Estate.*—*Rule in Shelley's Case.*—Where the testator in his will devises an estate to his son for life, and provides that at the son's death the persons who would have inherited from the son, had he owned the fee at the time of his death, shall take the same and in the same proportion as the law would cast it upon them, and declares that the

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provisions of the item shall "only vest in the devisee a life-estate *** and no more," the rule in *Shelley's Case* does not apply and the son takes only a life-estate. *Earnhart v. Earnhart*, 397

13. *Inquest of Insanity*.—*Effect*.—*Presumption*.—*Burden to Overcome*.—*Degree of Evidence*.—It is not error, in a will contest on the ground of the testator's unsoundness of mind, to charge the jury that an inquest finding the testator of unsound mind and placing him under guardianship, which is in force at the time the will is executed, "is *prima facie* evidence of insanity and incapacity on the part of the testator to execute the will in question," and that "it would, therefore, be incumbent on those who seek to establish such will to show by *clear, explicit* and *satisfactory* evidence that the testator had at the time he executed the will such mental capacity and freedom of will and action as are required to render a will legally valid." The italicized words do not render such instruction erroneous.

Stevens v. Stevens, 559

WITNESS.

See CRIMINAL LAW, 6, 8, 9; EVIDENCE, 2, 3.

1. *Impeachment of by Party Producing*.—*Surprise*.—*Discretion of Trial Court*.—A party producing a witness may show that he has made statements different from his present testimony, upon the ground of surprise. In such an instance the matter is of necessity left very much to the discretion of the trial court. Section 507, R. S. 1881.

Harrod v. Dismore, 338

2. *Widow*.—*Competent in a Partition Suit of Her Deceased Husband's Land*.—*Effect of Advancement on Her Interest*.—In an action for partition by the heirs of a land-owner, his widow, though a party to the record is competent to testify to the statements of her husband concerning advancements made to one of the heirs, if no objection is made that such statements are confidential and for that reason incompetent. Advancements made by her husband in no way affect her right to one-third of his real estate, and she has no interest in the controversy in relation to such advancements. *Scott v. Harris*, 520

3. *Volunteer Statement*.—*Cross-Examination*.—Where a witness, on direct examination, volunteers a statement not called for, and the statement is allowed to go to the jury without objection, it is not error to permit a cross-examination relative to the volunteer statement.

Apple v. Board, etc., 553

WORDS AND PHRASES.

See CRIMINAL LAW, 15.

WRITS AND PROCESS.

See SUMMONS.

END OF VOLUME 127.



